Feb 8 1870

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 390.

THE UNITED STATES, APPELLANTS,

vs.

HULDAH L. STANTON, TUTRIX TO ELIZABETH H. STANTON (NOW) RAWLE, FREDERICK STANTON, AND NEWTON H. STANTON.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 14, 1869.

Filed Dec 3 1868

Fee 26 Affirmed

Davis

SUPREME COURT OF THE UNITED STATES.

No. 390.

THE UNITED STATES, APPELLANTS,

vs.

HULDAH L. STANTON, TUTRIX TO ELIZABETH H. STANTON (NOW) RAWLE, FREDERICK STANTON, AND NEWTON H. STANTON.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Claimants' petition	1	3
Traverse and special pleas by United States solicitor	4	4
Plea of alienage by Attorney General	4	5
Replication	5	5
Final judgment by the court	6	6
Application of Attorney General and of the special counsel of Treasury Department for the allowance of an appeal	7	6
Order of Chief Justice Casey allowing appeal	7	6
Finding of facts and conclusions of law	8	6
Certificate	12	7

1 *Petition.—Filed* 31 *March*, 1868.

In U. S. Court of Claims.

HULDAH L. STANTON, TUTRIX TO ELIZABETH H. Stanton (now) Rawle, Frederick Stanton, and Newton H. Stanton,
vs.
THE UNITED STATES. } 3207.

To the honorable Court of Claims:

The petition of Huldah H. Stanton, tutrix, under the laws of Louisiana, to Elizabeth H. Stanton (now) Rawle, Frederick Stanton, and Newton H. Stanton, heirs of the late Frederick Stanton, a citizen of Natchez, in the State of Mississippi, showeth that she is the tutrix aforesaid; that she was duly appointed as such under the laws of the State of Louisiana; that the above-named heirs were, at the time of said appointment, minors, and, at the time of taking the cotton hereinafter mentioned, the said heirs were minors; that since that time the said Elizabeth H. has become of age, and has been duly married to John Rawle; that the said Frederick has also arrived at the age of twenty-one years; that the said Newton H. still is a minor under the age of twenty-one years; that the said heirs are equally interested in the plantation called "La Marque," in Concordia Parish, Louisiana, and that the said plantation has been held and worked by your petitioner, as tutrix aforesaid, for the joint benefit of the said heirs; that the said estate has not been settled up and divided between the said heirs owing to the infancy of the said Newton H., but has remained and still remains in the hands of your petitioner as tutrix aforesaid; that, by the laws of Louisiana aforesaid, the said Eliza-
2 beth H. Rawle is entitled to receive and hold her said interest in the said plantation and the proceeds thereof in her own right and independent of said husbanry.

Your petitioner further shows that, on or about the month of October, A. D. 1863, she, as such tutrix, was the owner of and in possession of two hundred and twenty bales of cotton, of the average weight of five hundred pounds to the bale, and of the aggregate weight of one hundred and fifteen thousand pounds; that, for the better protection of said cotton and to keep it from being destroyed by the confederate authorities, said cotton was removed to and secreted in the canebrake on said plantation.

Your petitioner further shows that during the months of October and November, A. D. 1863, all of said cotton was seized and taken possession of by Captain J. T. Organ, a United States officer, then in command of the parish of Concordia aforesaid, without the consent of your petitioner and against her will; that no part of the said cotton was appropriated to the use of the army or navy of the United States, but the said cotton was turned over, by said Organ, to Captain John Field, assistant quartermaster of the United States Army, and by said Field said cotton was turned over to an agent of the Treasury Department of the United States, by whom it was sold, and the net proceeds thereof have been paid into the treasury of the United States.

Your petitioner further avers that he is unable to state the precise sum for which said cotton was sold, or the expenses attending its seizure, shipment, transportation, and sale, but she states, on information and belief, that the said cotton was sold for about eighty cents per

pound, and that the net proceeds of said cotton was paid into the treasury of the United States, amounting to the sum of seventy-five thousand dollars.

Your petitioner further shows that said cotton was never abandoned or forfeited, and that no proceedings of any kind have ever been instituted against it; that said cotton belongs to your petitioner as tutrix aforesaid, and that she is entitled to receive the net proceeds thereof, amounting to the said sum of seventy-five thousand dollars, for the joint benefit of the said heirs, which sum she claims under the provisions of the third section of the act of Congress approved March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

3 Your petitioner further shows that she has, and that each of the said heirs have, at all times borne true allegiance to the government of the United States; that they have not, nor has either of them, aided, abetted, or given comfort to the recent rebellion against the government of the United States, or any other rebellion against the said government.

HULDAH L. STANTON, *Tutrix*,
By GEO. TAYLOR, *her Attorney-in-Fact.*

CITY AND COUNTY OF WASHINGTON, *District of Columbia, ss:*

Personally appeared before me, John Randolph, George Taylor, who, being duly sworn, says that he is the attorney-in-fact of the above-named petitioner, Mrs. Huldah L. Stanton, and of the said Frederick Stanton and Elizabeth A. Rawle, heirs therein described; that no assignment or transfer of said claim, or any part thereof, has been made, except as in said petition stated; that she is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that she believes the facts as stated in said petition are true.

GEO. TAYLOR.

Sworn to and subscribed before me this 28th day of March, A. D. 1868.

JOHN RANDOLPH,
Com'r Court of Claims.

Address of claimant: Natchez, Mississippi.
Address of claimant's counsel: Geo. Taylor, Washington City, D. C.

4 In the United States Court of Claims.—December term, A. D. 1867.

HULDAH L. STANTON ET AL.
vs.
THE UNITED STATES. } No. 3107.

And the said defendants, by John J. Weed, their solicitor, come and make answer to the petition of the claimants herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of seventy-five thousand dollars, the said defendants say that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

JOHN J. WEED,
Ass't Solicitor for the United States.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain their aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer their claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

JOHN J. WEED,
Ass't Solicitor for the U. S.

HULDAH L. STANTON ET AL.
vs.
THE UNITED STATES.
} No. 3207.—Dec. term, 1868.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain their aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of their said petition, were aliens, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents, therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," approved March 12, 1863.

Whereby, and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the government, and for the better defence of the treasury against unlawful claims," approved July 27, 1868, the claimants are barred of their said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney General.

5 In the Court of Claims.—Dec. term, 1868.

HULDAH L. STANTON ET AL.
vs.
THE UNITED STATES.
} No. 3207.

Now come into court the claimants, by Geo. Taylor, their attorney, and, for answer to the plea of alienage, say that the claimants are native-born citizens of the United States, and are not aliens, as avered in the defendants' plea aforesaid; all of which they are ready to verify.

GEO. TAYLOR,
Counsel for Claimants.

6 In the Court of Claims.

HULDAH L. STANTON & OTHERS
vs.
THE UNITED STATES. } No. 3207.

And now, to wit, 26 of May, A. D. 1869, the court, upon due consideration of the premises, find in favor of the claimants, and do order, adjudge, and decree that the said Huldah L. Stanton, as guardian of Newton H. Stanton, Frederick Stanton, and Elizabeth H. Rawle, in her own right, have and recover of and from the United States the sum of fifty-one thousand six hundred & ninety-six dollars sixteen cents, ($51,696 $\frac{16}{100}$.)

By the court.

7 In the Court of Claims.—Dec. term, 1868.

FREDERICK STANTON, ELIZABETH H. RAWLE, & Newton Stanton, by his guardian, Huldah L. Stanton,
vs.
THE UNITED STATES. } No. 3207.

To the Court of Claims:

The defendants hereby make application for the allowance of an appeal to the Supreme Court of the United States from the judgment rendered in this action on the 26th May, 1869, in favor of the claimant for the sum of fifty one thousand six hundred and ninety-six dollars and sixteen cents, ($51,696 $\frac{16}{100}$.)

Dated June 8, 1869.

ROBT. S. HALE,
Special Counsel of Treasury Dep't.
T. LYLE DICKEY,
Ass't Att'y Gen'l.

Filed in the clerk's office June 8, 1869.

At chambers.

Ordered that the appeal prayed in the case of Huldah L. Stanton & others vs. the United States, No. 3207, be allowed.

June 9, 1869.

JOS. CASEY,
Ch. J. C't of Claims.

8 In the Court of Claims.

HULDAH L. STANTON, TUTRIX & GUARDIAN, &c.,
vs.
THE UNITED STATES. } 3207.

The finding of facts and conclusions of law upon which the court founded its judgment.

1. This claim was brought by petition filed in this court on the 31st of March, 1868, to recover the proceeds of one hundred and ninety-six and one-half bales of cotton which were seized by the military authori-

ties of the United States in 1863, in the parish of Concordia, in Louisiana, and shipped to Vicksburg, and there turned over to an agent of the Treasury Department, and by him reshipped to St. Louis and there sold, and the proceeds paid over into the treasury of the United States.

2. The action was originally brought in the name of Huldah L. Stanton, tutrix of her minor children, Elizabeth, Frederick, and Newton H., all of whom, at the date of the seizure and the time of bringing this suit, were minors, and the real owners of the cotton. Since the seizure, and before the hearing of this cause, the two first have arrived at full age, and Elizabeth H. has intermarried with one John Rawle.

3. On this state of facts the attorney for claimants moved the court, after the majority of Elizabeth H. and Frederick Stanton, and the intermarriage of the former with John Rawle, to amend the petition by inserting the names of Frederick Stanton and Elizabeth Rawle, in their own right, as claimants, and her own name, Huldah L. Stanton, as guardian of her minor son Newton H., instead of tutrix, which the court allowed, and the cause, with the petition thus amended, proceeded to final judgment.

4. We further find that the claimants, including the guardian, adhered to the United States during the war, and did not give aid or comfort to the rebellion or persons engaged therein; and that the net proceeds of the cotton seized and sold as aforesaid amounted to the sum of $51,696 16, for which, on the foregoing facts, this court give judgment in favor of the claimants.

In the Court of Claims.

HULDAH L. STANTON, AS GUARDIAN OF NEWTON H. Stanton, Frederick Stanton, & Elizabeth H. Rawle,
vs.
THE UNITED STATES.
} No. 3207.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney General of the United States and of the special counsel of the Treasury Department for the allowance of an appeal, as filed in the clerk's office June 8, 1869, and of the order of the Chief Justice of said court, at chambers, allowing the same, of the finding of facts and the conclusions of law on said facts, on which the court founded its opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of December, A. D. 1869.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on record:) Court of Claims. No. 390. The United States, appellants, vs. Huldah L. Stanton, tutrix to Elizabeth H. Stanton (now) Rawle, Frederick, and Newton H., Stanton.

Filed 14th December, 1869.

United States Court of Claims.

December Term, A. D. 1867.

THOMAS PRICE vs. THE UNITED STATES,

AND OTHER CASES,

UNDER THE ACT OF MARCH 12, 1863, IN RELATION TO CAPTURED AND ABANDONED PROPERTY.

ARGUMENT

OF

W. PENN. CLARKE,

Of Solicitors for Claimants.

ON THE QUESTION,

When was the Rebellion Suppressed?

WASHINGTON, D. C.
PRINTED BY LEMUEL TOWERS:
1868.

UNITED STATES COURT OF CLAIMS.

DECEMBER TERM, A. D. 1867.

Thomas Price vs. The United States,

AND OTHER CASES,

UNDER THE ACT OF MARCH 12, 1863, IN RELATON TO CAPTURED AND ABANDONED PROPERTY.

BRIEF FOR CLAIMANTS ON THE STATUTE OF LIMITATIONS.

In these cases, in which the claimants seek to recover the nett proceeds of certain cotton and other property which was seized by the United States, and the proceeds paid into the Treasury thereof, under the act of March 12, 1863, providing for the seizure of captured and abandoned property, the petitions were filed in this court after the 1st of June, 1865.

The defendant pleads that the claimants ought not to have or maintain their actions, because said claimants did not, "within two years after the suppression of the rebellion," prefer their claims to the proceeds of said property, as required by the 3d section of said act.

The provision of the 3d section of the act of March 12, 1863, is as follows: "Any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court, of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and

sale of said property and any other lawful expenses attending the disposition thereof."

The question thus presented is, when did this limitation commence to run; or, in other words, *when was the rebellion suppressed?*

In the argument of this question, I shall endeavor to establish the following propositions:

1. That it is the peculiar province of the Congress of the United States, or of the President, or of both, under the Constitution, to determine when the rebellion was suppressed.

2. That Congress and the President—the political departments of the Government—have determined this fact, and concurred in deciding that the rebellion was suppressed on the 20th day of August, 1866.

3. That the political departments of the Government having fixed the time when the rebellion was suppressed, their decision is binding upon the judicial department, and must be followed by the courts.

First Proposition.

That it is the peculiar province of the Congress of the United States, or of the President, or of both, under the Constitution, to determine when the rebellion was suppressed.

The eighth section of the first article of the Constitution provides, that Congress shall have power to *provide for the common defence and general welfare of the United States; to declare war;* to provide for calling forth the militia to execute the laws of the Union, *suppress insurrections and repel invasions;* and to make all laws that may be necessary and proper for carrying into execution the foregoing powers.

These provisions of the Constitution place the whole war-making power, whether foreign or domestic or civil war, in the hands of Congress. In pursuance of this authority, Congress, on the 13th of July, 1861, passed an act authorizing the President to declare States or portions of States, in a state of insurrection against the United States, and providing that upon such proclamation being made, "all

commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful *so long as such condition of hostility shall continue;* and all goods and chattels, wares and merchandize, coming from said section or State, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States." 12th U. S. Stat., 257. This is the non-intercourse act; and on the 16th of August following, in pursuance of its provisions, the President issued his proclamation, declaring that a state of insurrection existed in the States of Georgia, North and South Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, Florida, and a part of Virginia. 12 U. S. Stat., 1262.

The effect of this statute, and the proclamation under it, was to recognise, by the concurrent action of Congress and the President, the existence of a state of civil war. It was virtually a declaration of war, by the war-making power, against the insurgent States, and all the consequences of war attended and followed the people residing in those States. Thus, the people of the two sections became public enemies — the presumption of law was, that every person residing within the limits of the rebellious States, were rebels and traitors— and their property became liable to seizure and confiscation. These views are fully sustained by the decision of the Supreme Court of the United States, in the *Prize Cases*, 2 Black, 635.

Says Judge Nelson:

"The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other—all intercourse, commercial or otherwise between them, unlawful; all contracts existing at the commencement of the war suspended, and all made during its existence utterly void.

* * * * * * * *

"In the case of a rebellion, or resistance of a portion of the people of a country against the established government, there is no doubt, if, in its progress and enlargement the government thus sought to be overthrown sees fit, it may, by the competent power, recognise or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties, as in the case of a public war."

Says Judge Grier:

"All persons residing within this territory (the territory of the rebel States,) whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors." 2 Black, 674.

And in the case of *Mrs. Alexander's Cotton*, 3 Wallace, 405, Chief Justice Chase says:

"This court cannot inquire into the personal character and dispositions of individual inhabitants of enemy's territory. We must be governed by the principles of public law, so often announced from this bench, as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States, must be regarded as enemies until, *by the action of the legislature and the executive*, or otherwise, that relation is thoroughly and permanently changed.

"Mrs. Alexander, being now a resident in enemy's territory, and in law an alien enemy, can have no standing in any court of the United States *so long as that relation shall exist.*"

In *Tibbett's Case*, 1 Nott. & H., 169, on a motion to dismiss on the ground that the action was prematurely commenced, a majority of this court, in sustaining the motion, say:

"The act contemplates property abandoned or captured in States in insurrection and belonging to their inhabitants, and these cannot bring suits while their States are in rebellion, *not until the effect of the President's proclamation of August* 16, 1861, *is removed from them.*"

These authorities clearly recognise the power of the "competent authority of the Government"—and in this case, Con-

gress—to declare the existence of a state of civil war; and this declaration when made, "draws after it all the consequences and rights of war between the contending parties, as in the case of a public war"—"the people of each State or district in insurrection against the United States" being "regarded as enemies *until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.*" This court stated the same conclusion in different language, when it decided that persons residing in the rebellious States could not bring suits in this court, so long as the rebellion existed, "*nor until the effect of the President's proclamation of August* 16, 1861, *is removed from them.*"

Congress delegated to the President the power to declare the existence of a state of insurrection or civil war. The President, as the agent of the war-making power, exercised the authority thus conferred. The proclamation of August 16, 1861, was issued. From that moment, the rebellion was elevated to the dignity of a civil war, and the insurgents became beligerents. On the part of the Government, it was not merely a war *de facto*, but a war *de jure*; and must continue, in legal contemplation, till its termination was officially announced by the authority which declared its existence. Such is the decision of the highest judicial tribunal known to our laws, and of its correctness there can be no doubt.

Assuming that I have established the proposition, that the power to determine when the rebellion was suppressed, pertains to the legislative and executive departments of the Government, or to one of them, I proceed to the consideration of the

SECOND PROPOSITION.

That Congress and the President have determined the rebellion was finally suppressed on the 20th of August, 1866.

Under this head, I shall show what has been the action of the legislative and executive departments recognizing the termination of the rebellion. Acting on the principle which

underlies the decisions above cited, viz: that the declaration of a state of insurrection or civil war, issued by the authority of the law-making power, continued in force, in legal contemplation, until the proclamation was revoked, or the suppression of the rebellion was announced, by the same competent authority, the President from time to time announced by proclamation, the suppression of the rebellion in various portions of the territory whose citizens were making war upon the Government. Proclamations, as follows, were issued by the executive:

May 9, 1865. Executive order to re-establish the authority of the United States, and execute the laws, within the geographical limits known as the State of Virginia.

May 25, 1865. Appointing Wm. W. Holden, provisional governor of North Carolina.

June 13, 1865. Respecting commercial intercourse, and the suppression of the rebellion in the State of Tennessee.

April 2, 1866. Announcing the suppression of the rebellion in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida.

August 20, 1866. Declaring the insurrection at an end in Texas, and civil authority existing throughout the whole of the United States, which concludes as follows:

"Now, therefore, I, Andrew Johnson, President of the United States, do hereby proclaim and declare that the insurrection which heretofore existed in the State of Texas, is at an end, and is to be henceforth so regarded in that State, as in the other States before named, in which the said insurrection was proclaimed to be at an end, by the aforesaid proclamation of the 2d day of April, 1866.

"*And I do further proclaim that the said insurrection is at an end, and that peace, order, tranquility, and civil authority exist in and throughout the whole of the United States of America.*"

This last, is the only proclamation that ever proclaimed the final termination of the civil war, and the restoration of the authority of the Government throughout the ter-

ritory of the United States. It is the only instrument that ever emanated from the President or Congress, which could relieve the people of the rebel States, in the language of this court in the *Tibbett's* case, "from the effect of the President's proclamation of August 16, 1861." And it is immaterial to inquire here, whether these proclamations were issued by the President, as the agent of the legislative branch of the Government, under the act of July 13, 1861, on the principle that the authority to declare a state of insurrection, included the lesser power of announcing its termination; or whether he issued them in virtue of his general power as Chief Executive of the nation. In either case, his authority for that purpose was ample. He is not only commander-in-chief of the army and navy of the United States, but it is his constitutional duty to "take care that the laws be faithfully executed;" and after those laws had been obstructed and resisted over a large scope of the territory of the nation, by large bodies of armed men, for a long period of time—after a rival government, claiming to be independent of the United States, had expelled the officers and loyal citizens of the Union, and trampled upon its flag—it was his proper constitutional duty to proclaim the subjugation of the rebels, and the final triumph of the authority of the nation throughout the borders of the Union.

The power to declare the rebellion at an end, and to announce to the world the restoration of the lawful authority of the United States, must exist somewhere. If it is not in the executive department, it must be lodged in the legislative branch of the Government. If, then, there is a doubt as to the power of the President to make such a declaration—if it is claimed that he is not the "competent authority," and his act is, therefore, void, I reply that that "competent authority" must be, either Congress or the President; and if they concur in the act, or in other words, if Congress approves, ratifies, and follows the act of the President, in that case the doubt is removed and the act becomes legal and binding.

Congress did recognise these proclamations of the execu-

tive, and particularly that of the 20th of August, 1866. First, negatively, by the passage of no act or resolution disapproving or annulling them; secondly, affirmatively, by proceeding to enact laws providing for the reconstruction of the States in rebellion, in which the termination of the rebellion is recognised, none of which were passed, I believe, prior to the 20th of August, 1866; and thirdly, directly, by an official recognition of the proclamation fixing the period of the final suppression of the rebellion and the complete restoration of the civil authority of the United States. This recognition and adoption of the time fixed upon by the President as the period of the final overthrow of the rebel government and authority, is contained in the act entitled, "An act to provide for the temporary increase of the pay of officers in the army of the United States, and for other purposes," approved March 2, 1867, the second section of which reads as follows:

"*And be it further enacted*, That section one of the act entitled, "An act to increase the pay of soldiers in the United States army, and for other purposes," approved June 20, 1864, be, and the same is hereby continued in full force and effect for three years *from and after the close of the rebellion, as announced by the President of the United States, by proclamation* bearing date the 20th day of August, 1866." Pamphlet Laws of 1867, 54.

Upon turning to the act of June 20, 1864, (Pamphlet Laws, 1863–4, 151,) thus amended, it will be seen that this act provides, "that on and after the first of May, 1864, *and during the continuance of the present rebellion*, the pay per month," &c. The act then goes on to fix the pay of non-commissioned officers and privates in the military service of the Government; and the soldiers were paid at the rates fixed by this statute up to the 20th of August, 1866. And the second section of the act of March 2, 1867, above cited, continued the pay of the soldiers at the same rate for three years longer from the close of the rebellion, to wit: the 20th of August, 1866.

Here, then, is an authoritative declaration by Congress, adopting the act of the Chief Executive, and concurring therein, that the rebellion closed, or was finally suppressed, on the 20th of August, 1866. There cannot be, it seems to me, any room for controversy as to the meaning of the limitation clause in the act of March 12, 1863. It gives the party claiming property seized under that act, "two years after the suppression of the rebellion," in which to prefer his claim in the Court of Claims. This must mean the final and complete, and not the *partial*, suppression of the rebellion. It was evidently the intention of the legislature, to allow time for the civil authority to resume sway—to give loyal men in the South, whose property had been seized, opportunity to think and act—before their rights should be prejudiced. And that this is the true construction of the act, may be inferred from the fact that in the subsequent acts which have been enacted by Congress, affecting proceedings under the act of March 12, 1863—I refer to the acts of June 25, and July 27, 1868—no attempt is made to shorten the time within which these suits may be brought.

In the face of these acts of the Government—the executive and legislative branches—the political department, whose special province it is to determine such questions—the "competent power" spoken of by Judge Nelson, in the *Prize Cases*—the Solicitor of the Government contends, that on the first of June, 1865, "*if not before*," every owner of captured and abandoned property could have "preferred his claim" to the proceeds thereof in the Court of Claims." A very indefinite position for so learned a gentleman to assume in the argument of such a plea! If before, *when*? And why is he himself uncertain as to the precise period when the limitation commenced to run? To support his position, the Solicitor cites and relies upon a single act of the national executive—the President's proclamation of the 10th of May, 1865. But what is that document? Upon turning to it, the court will find that the *whole* preamble (only part is quoted in the brief of the learned Solicitor,) reads as follows:

"WHEREAS, the President of the United States, by his proclamation of the 16th day of August, 1861, did declare certain States therein mentioned in insurrection against the Government of the United States:

"AND WHEREAS, armed resistance to the authority of this Government in the said insurrectionary States, *may be regarded as virtually at an end*, and the persons by whom that resistance, as well as the operations of insurgent cruisers, were directed, are fugitives or captives:

"AND WHEREAS, *it is understood that some of those cruisers are still infesting the high seas, and others are preparing to capture, burn, and destroy vessels of the United States.*"

Thereupon, the President goes on to enjoin all naval, military and civil officers of the United States, diligently to endeavor, by all lawful means, to arrest the said cruisers, and to bring them into a port of the United States, in order that they may be prevented from committing further depredations on commerce; and declaring that if, after a reasonable time shall have elapsed, the said insurgent cruisers and the persons on board of them, shall continue to receive hospitality in the ports of nations claiming to be neutral, this Government will deem it just cause of offence. 13 U. S. Stat. 757.

I confess that I do not perceive how this proclamation supports the claim of the Solicitor. These cruisers, sailing under the Confederate flag, and holding commissions from the president of that government, were as much a part of the rebellion as the armies of Lee and Johnson; and the very object of the proclamation was to cause their arrest, and exclude them from neutral ports, where they could obtain supplies to carry on their nefarious warfare against the commerce and people of the Union. To my mind, it is a clear admission that a portion of the rebels were still in arms—that the rebellion had not been suppressed.

It is claimed further by the Solicitor for the Government, that this court will take judicial notice of certain facts, viz.: the surrender of Lee, on the 9th of April, 1865; the surrender of Johnson, April 26, 1865; the surrender of Taylor, on the 4th of May; and the surrender of Kirby Smith, on the 26th

of May, 1865; and from these facts must infer that the rebellion was suppressed on the 1st of June following. Admitting that the court may take judicial notice of these historical facts, does the conclusion follow—that the rebellion was suppressed? Clearly not. The most that can be claimed from these facts is, that hostilities had ceased. It may be that the Solicitor assumes that the cessation of hostilities and the suppression of the rebellion, is one and the same thing, but there is a wide and marked distinction between the two, which is recognised by all writers on international and military law. Generals Grant and Sherman, as the commanders of the armies of the Union, possessed the power to suspend hostilities, and to grant paroles to those who thus surrendered, but further than this their authority did not extend. They could not declare the rebellion terminated, nor could the rebels themselves. The latter could and did inaugurate the war; but after the blow was struck, and the honor of the nation assailed, the power belonged alone to the lawful, constitutional government to say when the war should cease, and when the insurrection was terminated. The mere fact, that upon the cessation of warlike hostilities, commercial intercourse was resumed with persons in the rebellious States, and that local courts were open, could not change the legal fact, as stated by Chief Justice Chase, in the case of *Mrs. Alexander's Cotton*, that all the people of each State or district in insurrection against the United States, *must be regarded as enemies* until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed," nor, in the language of this court, in *Tibbett's Case*, "until the effect of the President's proclamation of August 16, 1861, is removed from them."

It will be remembered that both Lee and Johnston, at the time of their surrenders, desired to make peace. On the 8th of April, 1865, Lee writes to Gen. Grant:

"To be frank, I do not think the emergency has arisen to call for the surrender of this army, but as the *restoration of peace* should be the sole object of all, I desire to know whe-

ther your proposal would tend to that end. * * * As far as your proposition may affect the Confederate States forces under my command, and tend to the restoration of peace, I should be pleased to meet you at 10 a. m. to-morrow."

To which Gen. Grant, on the 9th, replied as follows:

"GENERAL: Your note of yesterday is received. *As I have no authority to treat on the subject of Peace*, the meeting proposed for 10 a. m. to-day, could lead to no good. I will state, however, General, that I am equally anxious for peace with yourself, and the whole North entertain the same feeling. *The terms upon which peace can be had are well understood.* By the South laying down their arms they will hasten that most desirable event, save thousands of human lives, and hundreds of millions of property not yet destroyed."

On the same day that this correspondence took place, the rebel force surrendered to Gen. Grant—Lee well comprehending that he had not made peace, but had placed himself and those whom he represented in the hands of the federal power. Nine days after, to wit: on the 18th of April, the rebel general, Joseph E. Johnston, also undertook to "make peace," and Gen. Sherman entered into an agreement with him, which amounted substantially to a treaty for that purpose, which is as follows:

Agreement between Generals Sherman and Johnston.

Memorandum or Basis of Agreement made this 18th day of April, A. D. 1865, near Durham's Station, in the State of North Carolina, by and between General Joseph E. Johnston, commanding Confederate army, and Major-General William T. Sherman, commanding army of the United States, both being present:

1. The contending armies now in the field to maintain the *status quo*, until notice is given by the commanding general of any one, to its opponent, and reasonable time, say forty-eight hours, allowed.

2. The Confederate armies now in existence to be disbanded and conducted to their several State capitals, therein to deposit their arms and public property in the State arsenal, and each officer and man to execute and file an agreement to

cease from acts of war, and to abide the action of both State and Federal authorities. The number of arms and munitions of war to be reported to the Chief of Ordnance at Washington city, subject to the future action of the Congress of the United States, and in the meantime to be used solely to maintain peace and order within the borders of the States respectively.

3. The recognition by the executive of the United States of the several State governments, on their officers and legislatures taking the oath prescribed by the Constitution of the United States; and where conflicting State governments have resulted from the war, the legitimacy of all shall be submitted to the Supreme Court of the United States.

4. The re-establishment of the Federal Courts in the several States, with powers as defined by the Constitution and laws of Congress.

5. The people and inhabitants of all these States to be guaranteed, so far as the Executive can, their political rights and franchise, as well as their rights of person and property, as defined by the Constitution of the United States, and of the States respectively.

6. The Executive authority of the Government of the United States not to disturb any of the people by reason of the late war, so long as they live in peace and quiet, and abstain from acts of armed hostility, and obey the laws in existence at the place of their residence.

7. In general terms, the war to cease, a general amnesty, so far as the Executive of the United States can command, on the condition of the disbandment of the Confederate armies, distribution of arms, and the assumption of peacable pursuits by the officers and men hitherto composing such armies. Not being fully empowered by our respective principals to fulfil these terms, we individually and officially pledge ourselves to promptly obtain an answer thereto, and to carry out the above programme.

W. T. SHERMAN,
Maj. Gen. Commanding Army U. S. in N. C.
J. E. JOHNSTON,
General Commanding C. S. A. in N. C.

This agreement was promptly rejected by the President, and thereupon Johnston surrendered upon terms similar to those granted to Lee.

The Government—and I mean thereby the political branches

thereof—having entered upon the suppression of the rebellion by force of arms—having recognised the existence of a state of civil war—it had the power to prosecute it so long as it pleased—and it alone possessed the power to determine when that condition of things should cease to exist. And until this power was exercised, a state of war *de jure* continued.

As establishing this point, I refer the court to the case of *Elphinstone* vs. *Bedreechund*. 1 Knapp's Reports, 351, which involved the legality of certain seizures made in India, after, it was claimed, the war was closed, the country conquered, and the people made British subjects. In the argument, Sir J. Scarlett, the Attorney General, contended:

"When the success of a commander of an army enables him to take military occupation of a country, he may either deliver it up to the ravages of his soldiers, if he is cruelly disposed; or, may place commissioners in it to preserve tranquility, until final arrangements are made respecting it; and in the latter case it is very advisable to allow the usual courts of justice, that existed in the country before the invasion, to continue their jurisdiction upon such subjects as the commissioners may not think proper to reserve for the consideration of the commander; but this does not deprive that commander of his power; or free the country from military government. In the present case, when the Peishwa had been driven away from Poonah, although the city was taken possession of by the British forces, other places still remained under his dominion, and it was the object therefore of the British commander to cover by a military force the greatest extent of country he could, and to induce the inhabitants to submit to the British arms. For this purpose Lord Hastings, who was the general-in-chief of the army, as well as vested with the supreme government of India, appointed Mr. Elphinstone, a commissioner for the provisional administration of the country during the time that it was occupied by His Majesty's forces. The country was under a military occupation in every sense of the word during the continuance of Mr. Elphinstone's commission, notwithstanding the existence of the ancient tribunals of justice for certain purposes, and the municipal courts at Bombay ought not, therefore, to have entertained any suit of this kind. (For the recovery of property seized by the military.) If it had been the policy of the

British government to have accepted the submission of Bajee Row, and to have replaced him on his throne, upon his making such sacrifices of treasure, or such a cession of dominion, as they might have thought fit to exact, could it have been contended, that what was done in the interval by the commissioner in the execution of the orders of Lord Hastings, or in the exercise of his discretion, would have been the subject of jurisdiction in the civil courts of Bombay? Had Mr. Elphinstone, in pursuance of instructions from the governor general, seized Gokla, or any other chief who was adhering to the Peishwa, can it be held that the chief could have brought an action against him for assault and imprisonment? And yet such conclusions appear inevitable from the premises on the other side."

The opinion of the court was delivered by Lord Tenterden, and is as follows:

"We think the proper character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person; and consequently that the municipal court had no jurisdiction to adjudge upon the subject; but that if anything was done amiss, recourse could only be had to the Government for redress."

And I contend that until the proclamation of the President announcing the total suppression of the rebellion and the restoration of the lawful authority over the rebellious territory, the property of the people residing in those States, were subject to military seizure and destruction, just the same as if hostilities were in progress. The fact is, that much of the cotton and other property claimed in these suits, were thus seized and sold by the Government, long after the period when it is claimed by the learned Solicitor that the war had terminated, and the rebellion had been suppressed. Like the case above cited, this property was seized *nondum cessante bello*, and the owners had no power to bring suits in the local courts against the officers seizing it under the orders of the Government.

Not only so, but the President and Congress up to this time treated the people of the seceding States, notwithstand-

ing the surrender of their armies, as in a state of rebellion. The military continued in possession of the territory its prowess had conquered. Martial law prevailed, and persons not belonging to the army were tried by military courts. There were either military governors, or provisional governors, appointed by the President in his capacity of commander-in-chief of the army and navy. When he undertook to reconstruct the rebel States, he assumed the authority of a conqueror, and treated the people as a subjugated people. He declared who should vote, and who should be eligible to hold offices of trust and power. He dictated what measures their conventions should adopt, and hectored them, when they refused his bidding. He required the representatives of the people, chosen to conventions ordered by himself, to repudiate rebel debts; to declare all insurrectionary proceedings in the States unlawful and void; to adopt the constitutional amendment abolishing slavery; and that they should extend the right of suffrage to the enfranchised slaves. Finally, after these reconstructed State governments, which he had called into existence, had elected governors and other officers, he instructed his provisional governors to continue to exercise the functions vested in them by himself, until they were relieved from that duty by his express orders—thus excluding from office those elected by the people. Thus, on the 29th of September, 1865, the Secretary of State instructs Governor Perry, as follows:

"DEPARTMENT OF STATE,
WASHINGTON, *September* 29, 1865.

"SIR: I have had the honor to receive, and I have submitted to the President, your letter of August 28, in which you state:

'I desire to be instructed as to my duty after the State convention of South Carolina shall have formed a State constitution abolishing slavery and popularizing the organic laws of the State. It is probable that the convention will provide for the election of members of the legislature and the election of governor by the people on the second Monday in October.'

"And in which you solicit answers to the questions—

'When these elections have taken place, is it my duty to convene this new legislature, as provisional governor, or are

my functions at an end when the new State government is organized? How long shall I continue to act as provisional governor? *Do my functions continue till the State is admitted back into the Union?*'

"In reply, I have the honor to inform you that the President does not think it now necessary to anticipate events. He will expect you to report proceedings and events as they occur in South Carolina, carefully and freely, for the information of this government. *In any case, you will continue to exercise the functions heretofore vested in you by the President, until you shall be relieved from that duty by his express orders to that effect.*

"Congratulating you on the favorable aspect of events in your State, I have the honor to be your obedient servant,

"WILLIAM H. SEWARD.

"His Excellency B. F. PERRY,
"*Provisional Governor of South Carolina, Columbia.*"

And again: On the 19th of October, 1865, Provisional Governor Sharkey informs the President that Benjamin G. Humphreys, who was elected to the office of governor of the State, has been duly installed into office, with the other State officers, and that the civil constitutional government of the State is now complete. Thereupon the President ordered as follows:

"WASHINGTON, *November* 3, 1865.

"Your letter of the 19th ultimo has been received. It is the expectation of the President, that you will continue your functions as provisional governor until further notice from this department.

"WILLIAM H. SEWARD.

"His Excellency WM. L. SHARKEY,
"*Provisional Governor of Mississippi.*"

Prior to this time, on the 24th of July, the President had telegraphed Sharkey, that the State government chosen by the people under his authority, would be provisional only, *until the civil authorities shall be restored, with the approval of Congress*, and had refused to abolish the military trial of civilians, or withdraw the military from the State.

Finally, all the expenses of the proceedings to establish new State governments in the seceding States, under the su-

pervision of the President, were paid by the War Department, *as an expense incident to the suppression of the rebellion.* This appears from the following:

"DEPARTMENT OF STATE,
WASHINGTON, *July* 22, 1865.

"SIR: I have received your letter of yesterday. * * * The inevitable and indispensable charges attending the measure, including your salary as provisional governor, will be paid by the War Department, as an expense incident to the suppression of the rebellion. You will, consequently, frame and submit to that department an estimate of those expenses, in order that the necessary arrangements for defraying them may be made.

"I am, sir, your obedient servant,
"WILLIAM H. SEWARD.

"His Excellency B. F. PERRY.
"*Provisional Governor of South Carolina.*"

Now, all of these measures of the President took place after the period when the Solicitor contends the rebellion was entirely suppressed, and when, if his position be the correct one, the civil authority of the United States was completely restored in those States. If this be admitted, or established by the decision of this court, then all the acts of the Executive referred to were absolutely void, and he stands before the nation the boldest usurper of modern times. The truth is, that these efforts of the President to reconstruct the rebellious States, can only be justified on the hypothesis that the rebellion still existed *de jure*, and the Government adopted these measures in enforcement of its belligerent rights. The measures themselves, show the character of the act. *Rose* vs. *Himely*, 6 Cranch, 272. It must be remembered, too, that these attempts at reconstruction, without which there could be no complete restoration of the civil authority, all took place prior to the passage of any acts by Congress providing civil governments for the insurgent States.

In view of these facts, which constitute a part of the history of the great rebellion, and of which the court will take judicial notice, I contend, that the position of the learned Solici-

tor of the United States, that the rebellion was suppressed on the 1st of June, 1865, "if not before," is illogical and unsound; that the rebellion continued in law, if not in fact, till long after the 1st of June, 1866; that there is a wide difference between the mere suspension of hostilities, occasioned by the surrender of the mass of the rebel forces, and the final suppression of the rebellion; and finally, that the President having declared that the rebellion was suppressed, and the civil authority of the Government restored throughout the Union, on the 20th of August, 1866, and Congress having recognised and concurred in that declaration, the time thus designated must be treated as the true period of the final suppression, *de jure* as well as *de facto*, of the rebellion.

THIRD PROPOSITION.

That the political departments of the Government having fixed the time when the rebellion was suppressed, their decision is binding on the judicial department, and must be followed by the courts.

By the Constitution, the Government is divided into three general departments, to which different and distinct powers and duties are assigned, which are clearly defined in that instrument. Upon the legislative department, which most directly represents the people, and is more completely within their control, is conferred the most important of those powers and duties. The duties thus imposed upon this branch of the Government, are almost wholly political, and devolves upon it the right to define and carry out the whole policy of the nation. In the exercise of the powers conferred upon it by the Constitution, each of these three different departments is entirely independent of the other, and each is supreme within its own sphere. There are no restraints on the exercise of these powers, except what is contained in the Constitution itself. One department cannot constitutionally determine the limits of the power conferred on a different branch of the Government, nor judge of the propriety of the measures employed to enforce those powers; but each department determines for

itself the extent of its powers and the means required to carry them into effect. In the exercise of its legitimate powers and duties by one of these grand divisions of the Government, there can be no appeal to another and different department. Upon this point, the language of James Madison, (1 Cong. Annals, 520,) is conclusive:

"I beg to know upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments? The Constitution is the charter of the people to the Government, it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought in question, I do not see that any one of these independent departments has more right than another to disclose their sentiments on that point."

It follows from this division of powers, and the independent character of each department, within the limits of those powers, that where a power is vested in a department of the Government, that department is to be the exclusive judge of the means to be employed to carry the power into effect, provided the Constitution contains no restriction upon the means. This position is sustained by a uniform current of decisions, both of the Federal and State courts.

In the *United States* vs. *Fisher*, 2 Cranch, 358, which involved the constitutionality of an act giving the preference to the United States in cases of insolvency, Chief Justice Marshall said:

"In the case at bar, the preference claimed by the United States is not prohibited; but it has been truly said that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised. It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorised, which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted

for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. *Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution.*"

In *Stuart* vs. *Laird*, 1 Cranch, 299, Judge Patterson says:

"Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper, and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the Constitution to prohibit or restrain the exercise of legislative power."

In *Martin* vs. *Hunter*, 1 Wheat., 304, which involved the constitutionality of the 25th section of the Judiciary act, Judge Story says:

"Where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly, or by necessary implication."

And further on, he says:

"The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. * * * Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require. * * * If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power; and as Congress is not limited by the Constitution to any particular mode, or time of executing it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control."

In the great case of *McCullough* vs. *Maryland*, 4 Wheat., 316, in which the constitutional powers were largely discussed by very able counsel, the opinion of the court was delivered by the great Chief Justice Marshall, who says:

"The subject is the execution of those great powers, on

which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to that end. * * * * To have prescribed the means by which the Government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. * * * * To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. * * * * The sound construction of the Constitution must allow to the national legislature, that discretion with respect to the means by which the powers it confers are to be carried to execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate—let it be within the scope of the Constitution—and all means which are appropriate—which are plainly adapted to that end—which are not prohibited, but consist with the letter and spirit of the Constitution—are constitutional."

And Judge Story (1 Com. on Const., Sec. 430) says:

"In the interpretation of a power, all the ordinary and appropriate means to execute it, are deemed a part of the power itself. This results from the very nature and design of a Constitution. In giving the power, it does not intend to limit it to any one mode of exercising it, exclusive of all others. It must be obvious (as has been already suggested) that the means of carrying into effect the objects of a power, may, nay, must be varied, in order to adapt themselves to the exigencies of the nation at different times. A mode efficacious and useful in one age, or under one posture of circumstances, may be wholly vain, or even mischievous, at another time. Government presupposes the existence of a perpetual mutability in its own operations on those who are its subjects, and perpetual flexibility in adapting itself to their wants, their interests, their habits, their occupations and their infirmities."

In *Gilman* vs. *Philadelphia*, 5 Wallace, 731, the court says:

"Within the sphere of their authority, both the legislative and judicial powers of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary."

So far as to the Federal courts. The same doctrine is established by the State courts, as applicable to the same division of powers in the State governments. In *Rome* vs. *Rome*, 18 New York, 41, the court says:

"The Constitution (Art. 8, Sec. 9,) provides that 'it shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations.'

"Now, from this provision, it is plain that the convention thought there had been, and might be, abuses in respect to the exercise of the named powers of municipal corporations. They, therefore, enjoined upon the legislature the task of restricting these powers so as to prevent the abuses. But it is manifest from the terms of the provision that these powers were, in some cases, at least, and to some extent, still to exist; for the direction is neither to abrogate existing powers, nor to abstain from creating new ones, but only to restrict them so as to prevent abuses in assessments, and contracting debts. Indefinite as is the rule of restriction prescribed by this provision, and ill-suited in its terms to be judicially applied, it is still both salutory and well suited to be the guide of legislative discretion. It presents to the legislature the general object to be attained, the prevention of abuses in assessments and contracting debts, and the general means of attaining that object, by restrictions on the powers to be conferred on municipal corporations; but it leaves to the discretionary power of that body the determination of what are abuses, and what extent of restriction, on the powers to tax, to lay assessments, to borrow, to contract debts, to loan credits, will prevent such abuses. The legislative judgment is appealed to, and is to be formed while they are deliberating upon the enactment of the law. Each particular case is to be determined on its own circumstances, as to the measure of restriction necessary to

secure the end proposed. Restrictions which, as to one municipality, would suffice, as to another might be altogether insufficient. To each case they are to apply a limit of power, which will, in their judgment, prevent abuse. If their judgment has been in any particular case erroneous, if the limit which they deemed sufficient has proved not narrow enough to exclude abuses, surely their judgment is not to be reviewed and reversed in a court of law. The rule is general, that a discretion committed to one authority is not to be reviewed by another. It holds, in regard to tribunals even of the most limited power, and it applies at least with equal force when the depositary of the discretion is also the depositary of the legislative power of the State."

In *The People* vs. *Fisher*, 24 Wend., 220, the court says:

"The argument in favor of the deputy necessarily concedes that the Constitution leaves it open to the legislature to supply the place (the office of clerk) until the people can conveniently exercise their privilege (by election). And if the legislature may supply the place in one way, I do not see why it may not in another; for the Constitution says nothing whatever on the subject. It is said, however, that the statute giving the appointment to the central power, though not against the letter, is contrary to the spirit of the Constitution, and, therefore, void. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation, under the notion of having discovered something in the spirit of the Constitution upon a subject which was not even mentioned in the instrument."

And to the same purport, will be found the following cases: *Grant* vs. *Comter*, 24 Barbour, 232; *Morris* vs. *The People*, 3 Denio, 381; *The People* vs. *Railroad Co.*, 34 Barbour, 123; *same case affirmed*, 24 New York, 485; *The People* vs. *Gallagher*, 4 Gibbs, (Mich.) 244.

It is true that the most, if not all, of the foregoing decisions refer to the exercise of power by the legislative department, but the principle applies equally to the other branches of the Government. That the doctrine is recognised by the Executive in his relations to Congress, is apparent by the statement made by the Attorney General in *Mississippi* vs. *Johnson*,

5 Wallace, 492, where, in speaking of the reconstruction acts, he says:

"From the moment they were passed over his veto, there was but one duty, in his estimation, resting upon him, and that was faithfully to carry out and execute these laws."

Having thus demonstrated that each department of the Government is independent of the others, in the exercise of the powers and prerogatives conferred upon it by the Constitution, and that where that instrument does not point out the means to be employed in carrying those powers into effect, it may exercise its discretion as to the means necessary to enforce its authority, it follows as a necessary and legal sequence, that the discretion committed to one branch of the government in the enforcement of its powers and duties, cannot be reviewed or annulled by another, and is binding on both the other departments. No principle is more firmly established than this, and none, perhaps, has been more frequently announced by the Supreme Court of the United States, as well as the various State courts. It is essential to the preservation of the just rights of each department, and to the whole theory of the Government, that this principle should be scrupulously enforced. Congress can no more annul a pardon granted by the President, than the President can refuse to obey, and cause to be obeyed, a law which has been constitutionally enacted over his veto. The Congress may think that the President erred in granting the pardon, and the President may believe that the legislature acted unwisely in the passage of the act, but in either case, the pardon and the act are valid. So, Congress may be of the opinion, that there is error in some decision of the judiciary—that it has misconstrued some statute, for instance—yet it possesses no more power to set aside that decision, and grant a new trial in that particular case, than the courts would have to pronounce an act unconstitutional and void, which was clearly within the provisions of that instrument. And were either department of the Government to attempt to thus encroach upon the rights of the other, the act would simply be a nullity, and be disregarded. The true theory is—

and it is well established by authority—that each department, within the limits of its constitutional powers and prerogatives, is supreme and exclusive, and its exercise of the authority thus conferred, is binding and conclusive upon the other branches of the Government. And especially is this true, where the powers to be exercised are political in their nature.

Let me, then, refer to some of the decisions on these points, and ascertain what they determine:

1. The courts will follow, and be bound by the action of the political department of the government, as to the existence or non-existence of a foreign power.

In *Rose* vs. *Himely*, 4 Cranch, 241, (2 Curtis, 87,) the court holds, that whether a revolted colony is to be treated as a a sovereign State, is a political question, to be decided by governments, not by courts of justice; and the courts of the United States must consider the ancient state of things as remaining, until the sovereignty of the revolted colony is acknowledged by the Government of the United States. In view of this decision, the question becomes pertinent right here—If the courts cannot decide as to the existence or non-existence of a foreign power, until after that question has been determined by the political departments of the government, how can they decide upon the suppression of a rebellion in their own government, before its termination is announced by the war-making power of that government, whose peculiar province it is to suppress such disorders? In *Gelston* vs. *Hoyt*, 3 Wheat. 246, (4 Curtis, 241), the decision in *Rose* vs. *Himely* is affirmed, and Judge Story says:

"No doctrine is better established, than that it belongs exclusively to governments to recognize new States in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of *Rose* vs. *Himely*, 4 Cranch, 241, and to that decision on

this point we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals. The *Manilla*, 1 Edwards, 1; *The City of Berne* vs. *The Bank of England*, 9 Vesey. 347; *Dolden* vs. *Bank of England*, 10 Vesey, 353; 11 Vesey, 283."

In *The United States* vs. *Palmer*, 3 Wheat. 610 (4 Curtis, 314), it was held "that when a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the Government of the United States." And to the same purport, are the following: *The Divina Pastora*, 4 Wheat., 52, (4 Curtis, 345); *The Neustra Senora*, 4 Wheat. 497, (4 Curtis, 453); *The Nueva Anna*, 6 Wheat., 193 (5 Curtis, 57); *The Santissima Trinidad*, 7 Wheat, 283 (6 Curtis, 268).

In *Foster* vs. *Neilson*, 2 Peters, 253, 308, it is held, the opinion having been delivered by Chief Justice Marshall:

"The judiciary is not that department of the Government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation had been a plain one, its courts would hesitate to pronounce it erroneous. * * * If these departments which are intrusted with the foreign intercourse of the nation—which assert and maintain its interests against foreign powers—have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."

And in *The United States* vs. *Baker*, in a case arising out of the late rebellion, recognizing the rule laid down in the foregoing cases, the court says:

"And if this is the rule of the Federal courts in the case of a revolt and erection of a new government, as it respects foreign nations, much more is the rule applicable when the

question arises in respect to a revolt and the erection of a new government within the limits, and against the authority of the government under which we are engaged in administering new laws. And in this connection it is proper to say, that as the Confederate States must first be recognized by the political departments of the mother governments, in order to be recognized by the country, namely the legislative and executive departments, we must look to the acts of those departments as evidence of the facts. Their act is the act of the nation, through the constitutional public authorities."

2. So the acts of the President, within his constitutional powers, are binding on the other departments.

In *Williams* vs. *Suffolk Ins. Co.*, 13 Peters, 420, the court says:

"And can there be any doubt that when the executive branch of the Government which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the Executive be right or wrong. It is enough to know that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

"If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered at peace with the United States, whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character."

In *Marbury* vs *Madison*, 1 Cranch, 137, (1 Curtis, 368,) the following language is employed:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorised to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the Executive, the decision of the Executive is conclusive.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."

In the great case of *Martin* vs. *Mott*, 12 Wheat. 19, (7 Curtis, 10.) in which the power of the President, under the act of 1795, to call out the militia in case of invasion or threatened invasion, was discussed, Judge Story says:

"The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. * * * * The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795."

And the same doctrine is held in *Luther* vs. *Borden*, 7 Howard, 1.

In *Astrom* vs. *Hammond*, 3 McLean, 107, Judge McLean holds:

"The judiciary cannot exercise a revisory proceeding over executive duties. In carrying a law into effect, the Executive must necessarily construe it, and it is not for this or any other court to say that there is error in the construction, and a different course must be pursued. * * * * In all matters of discretion, and in regard to the forms of proceeding, it is clear that executive acts, cannot, in any form, be drawn in question by the judicial power."

3. So, too, as to the discretionary power of the legislative department in matter merely political. The decisions on this point are equally clear and explicit.

In the *Cherokee Nation* vs. *Georgia*, 5 Peters, (9 Curtis, 1, 178,) which was a bill brought by the Cherokee nation to restrain the State of Georgia from the execution of certain laws of that State, Chief Justice Marshall, after deciding that the Cherokees were not a foreign State, in the sense of the Constitution, and could not maintain an action in the courts of the United States, says:

"That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect the possession, may be more doubtful. The mere question of right might, perhaps, be decided by the court in a proper case, with proper parties. But the court is asked to do more than decide on the title. The propriety of such an interposition by the court may be questioned. *It savors too much of the exercise of political power*, to be within the proper province of the judicial department."

In the important case of *Luther* vs. *Borden*, 7 Howard, 1, which involved the legal status of what was known as the Dorr rebellion in Rhode Island, it was held, that the courts of that State having decided that the charter government was in operation during the time of the commission of the acts complained of, the Supreme Court was bound by that decision; and that the question of the existence of a State

Government, was to be determined by the political department, and not by the courts, which decision was to be followed by the courts. Upon this point, the language of the opinion is as follows:

"The fourth section of the fourth article of the Constitution of the United States provides, that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature, or of the executive (when the legislature cannot be convened,) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognised by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no Senators or Representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

And, again:

"Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of State sovereignties, and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is

equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that according to the institutions of this country, the sovereignty of every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decisions, and to follow it."

And in the same case, Judge Woodbury, in his dissenting opinion, says:

"Looking at these considerations, it appears to me that we cannot rightfully settle those grave political questions which, in this case, have been discussed in connection with the new Constitution; and, *as judges*, our duty is *to take for a guide* the decision made on them by the proper political powers, and, whether *right or wrong*, according to our *private* opinions, enforce it till duly altered."

And when the Supreme Court announces, as it does in the *Prize Cases*, that "the people of each State or district in insurrection against the United States, must be regarded as enemies, until, *by the action of the legislature and the executive*, or otherwise, that relation is thoroughly and permanently changed;" and when this court declares, as it does in *Tibbett's Case*, that the people of the rebel States "cannot bring suits while their States are in rebellion, *nor until the effect of the President's proclamation of August* 16, 1861, *is removed from them*," both courts but reiterate the same doctrine, and fully recognize the exclusive jurisdiction of the political departments over this subject.

See, also, the more recent case of *The State of Georgia* vs. *Stanton*, 6 Wallace, 50, in which it was sought to restrain the executive authority from carrying into execution the reconstruction act, where the court ruled that the bill called for a judgment upon *a political question, and could not, therefore, be entertained by the Court.*

These authorities establish a principle which is not only reasonable and practical, but which preserves that just balance of power between the several departments of the Government, which the fathers of the Republic designed to establish, and which constitutes the best safeguard of the citizen against usurpation and oppression. If either department could constitutionally exercise control over the others, it would soon monopolize all power, and become the arbiter of the nation. On the other hand, the rule contended for by the learned Solicitor, if adopted, could only lead to confusion and disorder. If this court may disregard the action of the political departments of the Government, and upon certain facts which it assumes to be historical, determine that the suppression of the rebellion was complete on a day different from that announced by the President, why may not another court, in the exercise of the same privilege, upon another and different state of facts, of which it chooses to take judicial notice, decide that the suppression was perfected on a still different day? Thus the judicial department would be not only in antagonism with itself, but in direct conflict with the executive and legislative branches of the government. The mere statement of what must be the necessary consequences of the rule on which the Solicitor insists, is sufficient to show its absurdity, and the injury to public, as well as private, interests, in which it would result. Arrayed on the one side of the principle for which I contend, are not only the decisions of the highest judicial tribunal known to the Constitution, but the uniform practice of every branch of the Government since its foundation, while on the other side, is the unsupported opinion of the learned Solicitor for the Government, which can hardly be said to carry more weight, or be more authoritative, than the luminous judgments of a Marshall and a Story!

It is the duty of the courts to sustain the political branches of the Government, and particularly the legislative, rather than to seize occasions to thwart and defeat their action. This view is so forcibly expressed by Johnson, J., in his dis-

senting opinion in *Wynchamer* vs. *The People*, 3 Kernan, 477, that I cannot forbear from quoting his language here. The learned judge says:

"Should the time ever come when the courts, instead of promptly sustaining and enforcing the legislative will, become forward to thwart and defeat it, and to assume to prescribe limits to its exercise other than those prescribed in the Constitution; to substitute their discretion and notions of expediency for constitutional restraints, and to declare enactments void for want of conformity to such standards; or when, to defeat unpalatable acts, they shall habitually resort to subtleries, and refinements, and strained constructions, to bring them into conflict with the Constitution, the end of all just and salutary authority, judicial as well as legislative, will not not be remote. When men, chafing under the restraints of particular statutes, and prompted by interest, passion, appetite or partizanship, to disregard them, and set their authority, at defiance, once begin to expect from courts immunity and protection, instead of punishment, the judiciary will have lost, not only its claim to respect and confidence, but the power of enforcing general laws. Courts can only sustain their own authority and efficiency by vigilantly and fearlessly upholding and sustaining legislative enactments, in all cases where they are not plainly and clearly in derogation of constitutional limitations. The people have a far more certain and reliable security and protection against mere impolitic, over-stringent, or uncalled-for legislation, than courts can ever afford, in their reserved power of changing, annually and biennially, the representatives of their legislative sovereignty; and to that final and ultimate tribunal should all such errors and mistakes in legislation be referred for correction."

And the same views are expressed in *The People* vs. *Brooklyn*, 4 Comstock, 440; *Mosier* vs. *Hilton*, 15 Barbour, 657; and *Carpenter* vs. *Montgomery*, 7 Blackford, 415.

The question in the case at bar, when was the rebellion suppressed?—is clearly a political question—as much so as the declaration of a war, or the admission of a State, by Congress, or the granting of a pardon, or the negotiation of a treaty, by the President. If the courts possess no power to review either of these acts, they certainly can exercise none

to override the action of the legislative and executive branches of the Government on this question. Believing, therefore, that I have established the propositions, that it is the exclusive province of the political departments of the Government, to determine when the rebellion was suppressed, and the civil authority of the nation established throughout the borders thereof; that the legislative and the executive departments have concurred in the determination of this question, and fixed upon the 20th of August, 1866, as the period when the rebellion ceased to exist, in law and in fact; and that this decision is binding upon the judicial department, and must be followed by the courts, I cannot doubt that this court will overrule the plea of the statute of limitations, and decide these cases on their merits, the learned Solicitor "to the contrary notwithstanding."

Respectfully submitted,

W. PENN. CLARKE,

Of Solicitors for Claimants.

Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES,
APPELLANT,

vs.

HENRY GROSSMAYER.

ARGUMENT FOR APPELLEE.

Appeal from decision of the Court of Claims.

GEO. TAYLOR,
Counsel for Appellee.

Judd & Detweiler, Printers, Corner Penn. Avenue and 11th street.

Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANT,

vs.

HENRY GROSSMAYER.

ARGUMENT FOR APPELLEE.

Appeal from the decision of the Court of Claims.

The facts of the case are stated in the findings of the Court of Claims, and need not be repeated here.

I.

The counsel for the Government objects to the form of the judgment. The court finds that the cotton in question was seized and sold, and that the net proceeds were paid into the treasury, amounting to $8,040.96, for which amount, judgment is given. This is in conformity to the statute authorizing the judgment.

STATUTE OF LIMITATIONS.

The third section of the act of March 12, 1863, provides that "any person claiming to have been the owner of any such abandoned or captured property may at any time within two years after the suppression of the rebellion prefer his claim to the proceeds thereof in the Court of Claims." On this limitation the

question arises, when did the two years begin to run; or in other words, when was the rebellion suppressed?

Whether insurrection or rebellion was suppressed at a certain date or still existed, is a political question and not a judicial fact, and the courts in determining it are bound by the action of the political branches of the Government. The principle is well established by numerous decisions of this court, that questions in their nature political, or which are by the Constitution and laws submitted to the Executive, are not subjects of judicial cognizance. Marbury *vs.* Madison, 1 Cranch, 166–170; Garcia *vs.* Lee, 12 Pet., 511; Williams *vs.* Suffolk Ins. co., 13 Pet., 415; S. C. 3 Sum., 270; Scott *vs.* Jones, 5 H., 343; Luther *vs.* Borden, 7 H., 1; Kennet *vs.* Chambers, 14 H., 38; Clark *vs.* Brodon, 16 H., 635; Fellows *vs.* Blacksmith, 19 H., 366; United States *vs.* Holiday, 3 Wall., 407; Taylor *vs.* Martin, 2 Curtis, 454; Jones *vs.* Walker, 2 Pa., 688; *exparte* Metzger, 5 N. Y. Leg. Obs., 83.

The suppression of the rebellion being a question for the political branches of the Government to determine, it only remains for the court before which it arises to decide as to which department of the Government, Congress or the Executive, belongs the right and the duty to declare the rebellion suppressed, and from the action of such department to fix the date of its suppression.

We maintain that it is the peculiar province and duty of the Executive, under the Constitution and the laws, to judge when insurrection or rebellion exists, and to provide for its suppression, by calling out the militia and using the land and naval forces, and as a consequence, it is also the right and duty of the Executive, to determine when such insurrection or rebellion has been suppressed, and to declare the fact by proclamation.

In the case of foreign war, there can be little difficulty in determining the question of war or peace, for the Constitution gives to the President the exclusive power of making treaties of peace, which, when ratified by the Senate, become the supreme law of the land, and the end of war would date from the signature of the treaty. (Wheat. Int. Law, part 4, ch. 4, s. 5.) Blackstone

says: "Wherever the right resides of beginning a war, there also must reside the right of ending it, or the power of making peace." (Vol. II, 258.) Wheaton says, the power of making war and of declaring peace are generally associated. (Wheat. Int. Law, part 4, ch. 4, sec. 1.) And were it not for the express provision in the Constitution, making the assent of the House of Representatives unnecessary thereto, it would belong exclusively to Congress, which has the power under the Constitution to declare war, to determine also when it was at an end, or to make treaties of peace. Reasoning from analogy, we must conclude that as the power of declaring war and making peace are always associated, unless other provision is made by the Constitution or supreme power, so the Executive, whose right and duty it is under the Constitution and laws of this Government, to declare insurrection or rebellion to exist, and to provide for its suppression, must necessarily be the judge as to whether such rebellion thus declared continues to exist or has been suppressed, and it must be his duty also to declare its suppression when he considers it at an end.

The power of Congress to declare war and make peace is confined to a national or foreign war. In the Prize Cases, 2 Black, 668, in the opinion of this Court, delivered by J. Grier, it is said, "Congress cannot declare war against a State or any number of States. The Constitution confers on the President the whole executive power. He is bound to take care that the laws are fully executed." The Constitution of the United States, and the acts of Congress of February 28th, 1795, and March 3d, 1807, give the President power to call out the militia and employ the land and naval forces to suppress insurrection and cause the laws to be enforced. That he is the sole judge of the exigency contemplated by the act, and the paramount final judge as to whether rebellion or invasion exist, has been decided in this Court in Martin *vs.* Mott, 12 Wheaton, 30, and Luther *vs.* Borden, 7 Howard, 77. See also the opinion of Attorney General Bates of July 5th, 1861, in which he says, "In such a state of things the President must of necessity be the sole judge both of the exigency which requires him to act and of the manner in

which it is most prudent for him to employ the powers entrusted to him, to enable him to discharge his constitutional and legal duty to suppress insurrection and execute the laws;" and this discretionary power is fully admitted, he says, by the Court, in Martin *vs.* Mott.

The President's proclamation of the 15th April, calling for 75,000 men, his second proclamation of 3d May, 1861, calling for additional volunteers, were all done prior to any Congressional action, and in pursuance of the powers vested in him under the Constitution and the acts of Congress to suppress insurrection and enforce the laws. But all these acts of the President were promptly ratified and adopted on the meeting of Congress on the 4th July following. By the 5th section of the act of July 13, 1861, (12 Stat., 257,) it is provided that, under the conditions and exigencies there recited, it shall and may be lawful for the President by proclamation to declare that the inhabitants of any State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States;" and by a supplement to this act, approved July 31, 1861, it was enacted "that the power of the President to declare the inhabitants of any State, or any part thereof, in a state of insurrection, as provided in the 5th section of the act to which this is an addition, shall extend to and include the inhabitants of any State, or part thereof, where such insurrection against the United States shall be found by the President at any time to exist." (12 Stat., 284.) And also by the 2d section of the act of June 7, 1862, (12 Stat., 422,) the President is again authorized by Congress by proclamation "to declare in what States or parts of States said insurrection exists." In pursuance of this and the preceding acts of Congress, the President issued several proclamations declaring certain States and parts of States to be in insurrection. By the proclamation of July 1, 1862, issued in pursuance of the act of June 7, 1862, above recited, certain States and parts of States are declared "now to be in insurrection and rebellion, and by reason thereof the civil authority of the United States is obstructed," &c. (12 Stat., 1,266.) There were several subsequent proclamations to

the same effect, declaring what States and parts of States were in insurrection.

When the President, in pursuance of the acts of Congress, had issued his proclamations, we were in a state of insurrection or rebellion, or civil war, recognized as such by Congress and declared by the Executive, and the courts are bound to notice the fact. But how are we to know when this civil war or rebellion is suppressed? We learned of its existence through the official acts of the President, and the courts must hold that the insurrection thus legally declared by him is in existence; that this condition continues until the same authority decides to the contrary. The presumption is that the rebellion so declared continues until it is proclaimed to be suppressed by the authority which declared it to exist.

In the United States *vs.* Probasco, (11 Am. L. R., 419,) it was held that when the President has proclaimed a State to be in insurrection, the courts must hold that this condition continues until he decides to the contrary, and that the condition of war or peace, public or civil, in a legal sense, must be determined by the political department, and the courts are bound by that decision. In an analogous case, the Neptune, (1 Robinson, 170,) it was held by Sir William Scott that a blockade "*de facto*" expires "*de facto*," but a blockade by notification is *prima facie* presumed to continue till the notification is revoked.

The question then arises when did the Executive first declare by proclamation that the insurrection or rebellion which he had declared to exist, under the power given him by the Constitution and the laws, was suppressed and at an end in all the States in which it had been declared to exist. This was first done by the proclamation of August 20, 1866. By proclamation of June 13, 1865, (13 Stat., 763,) all restrictions upon trade east of the Mississippi river are removed except "as to contraband of war." The rebellion in Tennessee is declared to be suppressed and the disabilities and disqualifications upon the inhabitants of that State are removed, but not to impair "*existing regulations for suspension of habeas corpus and the exercise of military law in cases where it shall be necessary for the general public safety*

and welfare during the existing insurrection." (13 Stat., 763.) December 1, 1865, the suspension of the writ of habeas corpus was revoked except as to the State of Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas, the District of Columbia, and the Territories of New Mexico and Arizona. (13 Stat., 774.) On April 2, 1866, the President issued a proclamation declaring that "the insurrection which existed in the States of Georgia, South Carolina, North Carolina, Virginia, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida *is at an end, and is henceforth to be so regarded.*" The State of Texas was not included in this proclamation which shows that the President regarded the rebellion as not suppressed in that State, but to exist under his former proclamation, and it was not until the proclamation of August 20, 1866, that the insurrection was declared at an end in all the States. In this, the final proclamation on this subject, the President recites his former proclamations and declares the insurrection in Texas as at an end, and adds: "and I do further proclaim that the said insurrection is at an end, and that peace, order, and tranquility, and civil authority now exists, in and throughout the *whole of the United States of America.*" (13 Stat., 817.) It is evident then that the President did not regard the rebellion as suppressed, nor so proclaim it until August 20, 1866.

The 5th section of the act of July 13, 1861, declares that "it may and shall be lawful for the President by proclamation to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States, and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue," (or, in other words, so long as such insurrection should continue in any State, or part thereof,) unless licensed by the President. It was held by all the Departments of the Government, under this act, that after the President had declared a State to be in insurrection, that this condition

continued so as to render unlawful any commercial intercourse with such State until the President by proclamation declared that such condition no longer continued. This act made the President the sole judge as to the fact of the continuance of the rebellion so far as commercial intercourse was concerned, and made it his duty to declare its suppression by proclamation; and the President (Mr. Lincoln) so understood it and construed it, for in his proclamation of March 31, 1863, he declared certain States in insurrection, and that all commercial intercourse should be unlawful until such insurrection should be suppressed, *and notice thereof should be duly given by proclamation.* In the proclamation of June 24, 1865, removing restrictions upon commercial intercourse between and within the States and Territories west of the Mississippi river, there were still some restrictions left as to transporting therein arms, ammunition, grey cloth, &c.; and commercial intercourse was not fully and completely restored in Texas until the proclamation of August 20, 1866, declared the rebellion to be suppressed there and throughout the whole of the United States. The act of July 13, 1861, declared that commercial intercourse should be restricted only during the existence of the rebellion, and the President could restrict it only, in the words of the act, "while such condition of hostility continued." The fact that such restrictions were continued, and not fully removed until the proclamation of August 20, 1866, shows the rebellion still existed up to that date, and was so regarded by the President. There can be no doubt, then, that the action of the Executive fixes the date of this event on the 20th August, 1866. But whether we take the view that it belonged to the Executive alone to determine this question, or that it is the province and duty of Congress, as having the right to define and declare the political status of the several States in their relations to the national Government, we will arrive at exactly the same conclusion in fixing the date of this event.

Congress not only authorized the Executive to act for them and decide in the premises, but his acts and proclamations were subsequently ratified and adopted by statute; but not only this,

Congress has by legislative enactment, on the very point in question, fixed the date of the suppression of the rebellion on the 20th of August, 1866, and expressly adopted the proclamation of that date as determining the question.

The act of June 20th, 1864, (s. 1, 13 Stat., 144,) enacted "that on and after the 1st May, 1864, and *during the continuance of the present rebellion*, the pay per month of con-commissioned officers and privates in the military service shall be as follows," &c. In determining when this increased pay ceased, the War Department adopted the proclamation of the President of August 20th, 1866, as fixing the date of the suppression of the rebellion at which the increased rate should cease. And Congress, in the act of March 2d, 1867, (2 sec., 14 Stat., 422,) declared "that section one of the act entitled an act to increase the pay of soldiers in the United States Army, and for other purposes; approved June 20th, 1864, be and the same is hereby continued in full force and effect for three years from *and after the close of the rebellion*, as announced by the President of the United States by proclamation bearing date the 20th day of August, 1866."

Thus, by the concurrent action of the Executive and Congress, by direct and explicit legislation on the very point in question, the date of the suppression of the rebellion is fixed on the 20th August, 1866, and if it is the province and the right of either or both of these departments of the Government to decide this question, and the courts are bound by their action, the limitation contained in the act of March 1, 1863, did not expire until August 20, 1868.

Whether this action of the political branches of the Government in deciding the question, whether civil war did or did not exist at a certain time, is final and conclusive, and binding upon the courts, or whether they can decide the question for themselves as a judicial fact, is the only question remaining. That this action is final, and that the courts are bound to follow it in deciding the question, is abundantly sustained by the decisions of this Court. In Astrom *vs.* Hammond, (3 McLean, 107,) Justice McLean says: "The judiciary cannot exercise a revisory proceeding over executive duties. * * In all matters

of discretion it is clear that executive acts cannot in any form be drawn in question by the judicial power." In Rose *vs.* Himely, (4 Cranch, 241,) it was held that whether a revolted colony is to be treated as a sovereign State *de facto* is a political question to be decided by governments, not by courts of justice. In Gelston *vs.* Hoyt, (3 Wheat., 246,) this decision is affirmed. In Foster *vs.* Neilson, (2 Peters, 307,) Chief Justice Marshall said: "The duty of the judiciary is to decide upon individual rights according to those principles which the political department of the nation has established." In Marbury *vs.* Madison, (1 Cranch, 139; 1 Curtis, 368,) this court held that there can exist no power to control the discretion of the President in the exercise of the political powers with which he is invested, and that his decision is conclusive. In Martin *vs.* Mott, (12 Wheat., 19; 7 Curtis, 10,) in speaking of the power of the President to call out the militia in case of insurrection, Judge Story says: "We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. * * * The law does not provide for any appeals from the judgment of the President. Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts, and we are all of opinion that such is the true construction of the act of 1795." (See also Cherokees *vs.* the State of Georgia, 5 Peters, 20.) In the recent case of Mississippi *vs.* Johnston, (4 Wall, 475,) Mr. Chief Justice Chase, in delivering the opinion of the Court, said that the duty of the President in the exercise of the power to see that the laws are faithfully executed is purely executive and political; and in the case of Georgia *vs.* Stanton, (6 Wall, 50,) the Supreme Court of the United States refused to entertain jurisdiction, for the reason that "the case calls for a political judgment, and therefore will not be entertained by the Court."

The very point in dispute here arose, and was recently decided in the Supreme Court of West Virginia, in Conley, et. als., *vs.*

the Supervisors of Calhoun county. (2 W. Va. Rep., 416.) The court in this case held that the proclamation of August 20, 1866, fixed the date of the suppression of the rebellion, and that being a public act, the courts are bound to take judicial notice of, and are concluded by it, and "that it was a question to be determined by the political department of the Government, and not by the judicial."

But even if we suppose that the courts were at liberty to go into this question, and were not bound by the action of Congress and the Executive, but could decide it for themselves as an ordinary fact, what other mode of fixing the date of this event could they adopt? Any other mode would leave the question in doubt and uncertainty. If it should be dated from the surrender of all the armed forces of the rebel States, or from the opening of the courts in these States—still it would in either case be very difficult to say at what particular time all armed resistance to the United States Government ceased, or at what time the courts were all opened throughout every portion of the insurrectionary States.

As to fixing the date of this event by the surrender of the rebel armies in the field, we hold that there is no authority known to our form of government which can annul the constitutional acts of Congress, and the acts of the Executive in pursuance thereof. It seems clear, therefore, that the simple acceptance by our generals of a surrender of the confederate armies in the field, which had been called out after the rebellion was organized and in existence, does not of itself constitute a suppression of that rebellion. The President, as commander-in-chief, might ratify or reject the terms agreed on by them. It was necessary that the power whose duty it was to suppress insurrection and enforce the laws should be convinced that those States had accepted the decision by arms and returned to their allegiance, and ceased all opposition to the enforcement of the laws of the United States, and that that fact should be proclaimed. The surrender of the army, then, is not the proclamation of peace, and does not annul the acts of Congress and the Executive.

Is it more reasonable to suppose that it was the intent of the

act of March 12, 1863, in fixing this limitation, that it should commence from some definite and certain period, to be fixed by the Executive and Congress, that claimant might know with certainty within what period he might bring his action, or that it was to be left to the court to decide it after the limitation had expired, so that in bringing his action claimant should be left in uncertainty as to whether he was within the limitation, and thus, after much labor and expense, be liable to lose his suit by his mistaken judgment as to a political question? That distinguished jurist, Judge Tucker, in speaking of the difficulties which would arise from uncertainty in fixing the date of events in such cases, says, of the proclamation of the President, that "the commencement or determination of laws are frequently made to depend on events of which the Executive may be presumed to receive the first authentic information, the notification of such facts seems, therefore, to be the peculiar province and duty of that department." (Tucker's Blackstone, Part I, Appendix 346.)

It is evident that it was never intended that there should be but one period of limitation for all loyal claimants under this act. Although the rebellion extended over many different States, there was but one rebellion, and it is spoken of as such in the words of the act, which are, "within two years from the suppression of *the rebellion*," and it cannot be held that it was suppressed so long as it existed in any one State or part of a State—so long as it was not fully suppressed throughout the entire district in which it existed.

The act, from its wording, cannot be held to contemplate but one limitation for the citizens of all the States. It cannot be held that the two years began to run and expired at one time for the citizens of Georgia and at another for the citizens of Texas. In this view of the matter we maintain that all claimants preferring their suit in the Court of Claims prior to August 20, 1868, were within the limitation and not barred by the statute.

CONSTRUCTION OF SIXTH SECTION OF THE ACT OF JULY 17, 1862.

The act of July 17, 1862, (12 Stat., 589,) is a penal act, and must be strictly construed. The words of the 6th section which declares that all transfers, sales, or conveyances of any such property shall be null and void, &c., are to be construed in reference to the object and purpose of the act, and in connection with the other sections (the 5th, 7th, and 8th,) relating to the confiscation of such property, they being all "*in pari materia*," and having the same purpose in view.

The 5th section declares that it shall be the duty of the President to cause the seizure of all the estate, property, money, stocks, credits, &c., of certain persons, and apply and use the same for the support of the army of the United States; and this and the next section (the 6th) define the class of persons whose property shall thus be *liable* to seizure. The 7th section prescribes the mode of proceeding to secure the condemnation and sale of such property, to make it available for the purpose aforesaid, viz: by proceedings "*in rem*" in the United States district courts, and that it shall be condemned, *if it shall be found* that such property belonged to a person in rebellion, or who has given aid or comfort thereto, after the date therein fixed, and (then and not before) it should become the property of the United States. Incorporated in this sixth section is this clause as to all sales and transfers by such persons being void. Taking these four sections together which relate to the seizure, condemnation, and sale of such property, there can be no doubt that the meaning and intent of this clause is, that it should apply only to such property as should be seized and condemned in the Federal courts, in the manner prescribed in this act. This is the plain and natural construction to be given to it, and makes it accord with the object and purpose of the act of which it forms part. This object was, that when proceedings were thus had and the property found to have belonged to one of the class of persons named in

the act, that on condemnation the title of the Government should go back by relation to the act of forfeiture, and avoid all subsequent conveyances or sales of such property as against the United States. Can it be claimed that this provision of the 6th section was intended to be construed independently of the other portions of this act, and apply to all property of the persons described, whether it was seized and condemned in the manner prescribed or not, and thus render void all transfers of property, and put an end to all commercial dealing throughout the entire insurrectionary district, embracing ten States and thirteen millions of citizens. Such an interpretation is entirely contrary to all known rules of construction. There is no rule of construction better established and more constantly applied than this, that the whole statute, or those portions "*in pari materia*," should be construed together, and not one clause or provision construed separately, and without reference to the object and purpose of the act and the manner prescribed for its attainment. *Optima statuti interpretatio est ipsum statutum, injustum est nisi tota lege inspecta, una aliqua ejus particula proposita judicare vel respondere.*

The beginning of the 5th section states the object and purpose of this portion of the act. The words are, "that to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United Stated to cause the seizure of all the estate and property, &c., of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States." This, for the purpose of construction, although in the body of the act, may be regarded as the preamble to this portion of it, embracing the 5th, 6th, 7th, and 8th sections; for it states their object and intent, viz: to support the army by seizing and applying for its use the property of certain persons who are punished for their rebellious acts. This object could only be carried out under this act by condemnation in the district courts. No property in any other way could be applied for the purpose contemplated, under the provisions of this act, and of course its provisions apply only to such property. As to all other property not seized and condemned in the manner prescribed, it does not

come within the purview of the act, or the intent as expressed in the introductory clause, which may be considered for the purpose of construction as the preamble, which Lord Coke calls the key to open the understanding of the statute. The object, as expressed in this preamble or introductory part, having failed as to this property, it having never been seized and condemned under the act, its provisions as to sales and transfers do not apply. According to the maxim of the Civilians, "*Cessante præmio cessat et ipsa lex.*"

EFFECT AND OPERATION OF ACTS OF JULY 2, 1864, AND OF MARCH 12, 1863.

By the 3d section of the act approved July 2, 1864, (13 Stat., 376,) the first and sixth sections of the act approved March 12, 1863, are extended and amended so as to include every description of property mentioned in the act of July 17, 1862, as being liable to seizure and confiscation. Thus, in express words, all property liable under this last act to seizure and confiscation were taken out of the operation of this act of July 17, 1862, and brought within the provisions of the act of March 12, 1863, and of course the clause of section 6, of act of July 17, 1862, as to sales and transfers of such property being void, does not apply to property thus brought within the act of March 12, 1863, and for the proceeds of which, action is brought by claimant under this act; and the Government, by this last act, expressly waived its title to the property in favor of the loyal owner on his show- a title good against all others except the Government. We maintain, then, that the act of July 2, 1864, virtually repealed the provisions of the act of July 17, 1862, as to captured and abandoned property, by expressly taking such property out of the operation of the act of July 17, 1862, and bringing it within the provisions of the act of March 12, 1863. As the act of July 2, 1864, conflicts with and cannot be reconciled with the act of July 17, 1862, it repeals the provisions of that act without any repealing clause. The act of July 17, 1862, was merely a tem-

porary act, and expired with the rebellion, and none of its provisions can now be brought forward and applied to divest the title of the loyal owner of property, and defeat rights given him by the subsequent act of March 12, 1863, by which the provisions of this act were expressly waived in favor of the loyal owner who should prosecute his claim under that act.

EFFECT AND OPERATION OF PARDON AND AMNESTY.

The effect and operation of the President's pardon and amnesty is to remove all legal disabilities and penalties from the parties coming within the class of persons described in the act of July 17, 1862, and it is too late now to declare sales made by them void under the sixth section of this act. Whether or not pardon or amnesty can relieve the claimant from the necessity of proving his own loyalty in the Court of Claims, (Congress having limited the jurisdiction of that court under the act of March 12, 1863, to those who gave no aid or comfort to the rebellion,) is not material here, for this is an entirely different case. It was not made one of the conditions on which claimant should recover, that he should establish the loyalty of those through whom he derived title.

In considering the effect and operation of the President's pardon we will quote from the opinion of this Court in *Ex parte* Garland, (4 Wall,) as follows:

"The Constitution provides that the President shall have power to grant reprieves and pardon for offences against the United States except in cases of impeachment. The power thus given is unlimited, with the exception stated. It extends to every offence known to law, and may be exercised at any time after its commission, either before proceedings are taken or during their pendency, or up to conviction or judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

"Such being the case, the inquiry arises as to the effect and operation of a pardon; and on this point all the authorities con-

cur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence."

The vendors of this cotton, and all through whom the claimant derives his title, have received full pardon and amnesty by proclamation of the President, issued under the authority of the thirteenth section of this very act of July 17th, 1862.

This was a penal act, and made the property of the persons therein described liable to seizure, condemnation, and sale, and all sales and transfers by them void as against the United States, in case of condemnation in the district courts, as a penalty for their offence. The parties who owned this cotton, or claimants' vendors, sold it, and received the money for it. The sale has never been declared void by any court, nor by proceedings of condemnation under the act, and it is too late now, after all the parties have received full pardon and amnesty, to declare that they had not the legal ability to make such sale and pass a valid title to claimant. It is now settled that a pardon removes not only the punishment, but all the legal disabilities consequent on the crime. (Bacon Abridg't, Pardon, vol. 7, p. 416, Ed. 1846.) If, under the act of July 17th, 1862, they were under the legal disability to sell or transfer their property without having their sales liable to be voided in favor of the United States, when they received pardon and amnesty, it was as if that legal disability never existed, and all sales made by them were no longer liable to be voided, but were rendered valid, if they were not so before.

Amnesty buries the crime ino blivion, and raises the presumption, *juris et de jure*, that no such crime was ever committed, and forbids the court to allow it to be alleged or proven. (Vattel, Law Nation, v. 4, ch. 2, sec. 20.)

In Bishop's Criminal Law, it is said that the effect of a pardon is to absolve the party from all consequences of his crimes. (Cope *vs.* The Commonwealth, 4 Casey, Pa. R., 297; 24 Peck, 280.)

In *exparte* Garland, before quoted, p. 418, this court further declared that "pardon if granted before conviction prevents any of the penalties and disabilities consequent on conviction from attaching, if granted after conviction, it removes the penalties and disabilities and restores him to all civil rights, it makes him as it were a new man. There is only this limitation to its operation, it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." (See, also, 4 Black, 402, 6 Bac. Pardon book 2, c. 37, § 34 and 54.)

In this case neither prior to the pardon nor since, has there been any conviction or judgment nor anything equivalent to it, and not even any proof that the parties belonged to the class of persons coming within the penalty of the act of July 17, 1862.

In a proceeding *in rem*, in a district court, under the 7th section of the act of July 17, 1862, to condemn property seized under it, a pardon pleaded would be a complete and perfect answer to the libel. This was held by this Court in the Armstrong Foundry cases, (6 Wall., 766,) and St. Louis Foundry cases, (6 Wall.) In the case before cited, (*ex parte* Garland,) this court says, "t effect of the pardon is to relieve from all penalties and disabi ties attached to the offence of treason committed by participati in the rebellion. So far as that offence is concerned, he is plac beyond the reach of punishment of any kind."

In this case the Government seeks to avoid the title of claimant, by showing that he derived his title through a person who was under a disability to convey or sell his property, or give a title which the Government could not avoid, and this disability was fixed upon him as a penalty for an offence. In accordance with the decisions of this Court above quoted, and the principles of the common law as to the effect and operation of pardon, this penalty cannot now be enforced by declaring such sales void. This would make the vendor liable to refund the purchase money he received, which would be a punishment for the offence after it had been pardoned.

The thirteenth section, under which the President was authorized to grant pardon and amnesty to persons guilty of participation in the rebellion, is part and parcel of the confiscation act of

July 17, 1862, under which it is claimed that such sales and transfers should be held void, and it was evidently the intent of the legislature that such pardon should have the effect of entirely removing any of the penalties or forfeitures annexed by the provisions of this act to the offence therein described.

The authority of Congress to pardon was not necessary, as that is one of the constitutional prerogatives of the President, but the act may be referred to for the purpose of showing the intention of Congress, which intention was observed and carried out by the President.

BURDEN OF PROOF.

If it should be held that the clause in the sixth section, as to sales and transfers being void, applies not only to property seized and condemned under the act of July 17, 1862, but also to captured and abandoned property, the proceeds of which might be recovered under the act of March 12, 1863; if it is held that the provisions of this act (July 17, 1862,) were not virtually repealed by the act of July 2, 1864, which expressly took such property out of the provisions of the act of July 17, 1862, and brought it within the operation of the act of March 12, 1863; and it is also held that pardon and amnesty have not the effect to render it immaterial to inquire into the loyalty of vendors of such property; still, the *burden of proof* must rest on the Government to show that the parties whose sales it seeks to make void belonged to the class mentioned in the act.

Under the act of July 17, 1862, before such sales and transfers of property of disloyal persons could be declared void and the property condemned and sold, the Government must first prove that the parties came within the prescribed class—that they did not cease to aid and abet said rebellion within the sixty days after the warning of the President. The words are, *If it shall be found that such property belonged to a person in rebellion*, &c., *and who had not ceased to aid and abet the same within the sixty days after warning*, it should then be condemned, and there

was nothing in the act of March 12, 1863, which shifted the burden of proof on the claimant, or required him to prove the loyalty of those through whom he derived title. By that act the claimant was only required to aver and prove his own loyalty. That alone was made material, nor has there been any subsequent act requiring him to aver or prove the loyalty of any other party.

The third section of the act of June 25th, 1868, (15 Stat., 76,) did not have the effect to shift the burden of proof on him as to the loyalty of his vendors. That section is as follows:

"That whenever it shall be material in any claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, *the claimant* or *party asserting the loyalty* of any such person to the United States *during such rebellion*, shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force held sway, shall be *prima facie* evidence that such person did give aid and comfort to said rebellion and the persons engaged therein."

This means just what it plainly declares, that whenever it shall be material for the *claimant* or *party asserting* it to prove the *loyalty* of any person, that is, when the burden of proof is on him, (when, in the words of the act, he asserts it,) then he shall prove affirmatively that he did adhere *throughout the rebellion*, &c., &c.; and the *prima facie* presumption arises from residence that such parties did give aid and comfort. But the act does not, nor can it, be construed to mean that when the *defendant* or party *asserting the disloyalty* of any person whose disloyalty it is material for him to prove, that is when the burden of the proof rest on the defendant—that in that case the burden should be shifted on claimant, and he be required to show the loyalty of such person, in the manner prescribed in that section; or that in that case the *prima facie* presumption referred to should apply to such person.

Again, another reason why this section cannot be held to apply to the proof of loyalty of vendors, either as regards the

extent of proof or the *prima facie* presumption, is this: first, the words are "whenever it shall be material in any suit to ascertain whether any person did or did not give *any aid or comfort* to the late rebellion." Now, as regards such vendors, it cannot, in any view of the case, be material to determine whether they gave *any* aid or comfort to the rebellion. That is not a material question, for they may have given aid and comfort to the rebellion prior to the warning given by the President under the act of July 17, 1862, and still not come within the class prescribed in the act; and, for the same reason, it cannot be necessary for claimant or either party to "assert the loyalty or disloyalty of any such person to the United States *during the rebellion*," for these words evidently mean during the whole period of the rebellion; for the section goes on to declare that claimant, or party thus asserting it, "shall prove affirmatively that such person did *consistently* adhere," &c., "and did give *no aid* or comfort to persons engaged in the rebellion, and the voluntary residence of any such person," &c. Now, if it is held that this section applies to the proof of loyalty in this case, then it must be shown that these vendors never gave *any aid or comfort* during the whole period of the rebellion, and did consistently adhere, &c., which could not be necessary, for the act of July 17, 1862, only provides that such sales should be void, if the vendors did not cease to aid and abet, &c., after the 22d September, 1862, or sixty days after the warning given. As to the presumption raised by residence, the words are "and the voluntary residence of *any such person*"—that is of any such person as those just spoken of, whose loyalty is asserted during the rebellion, (the whole period of the rebellion)—"shall be *prima facie* evidence that such person did give aid and comfort to the said rebellion," &c. This presumption, then, can only apply to such persons whose loyalty is asserted throughout the whole period of the rebellion; and even if it did arise here, it could only be, in the words of the act, a presumption that the party gave *aid and comfort*, and not that he continued to give aid and comfort after the sixty days from the warning of the President.

If the onus of proof would have rested on the defendant

before the passage of this act of June 25, 1868, to hold that the third section of this act shifted it on the claimant, would be to construe it so as to make it a retrospective statute, and it is a rule that a statute shall never receive that construction, unless the intention is so clear and positive as to admit of no other construction. The act of March 12, 1863, gave the claimant the right to recover the proceeds of his cotton on certain conditions; it had become a vested right, and no subsequent statute should impose new conditions of recovery by requiring proof which, in many cases claimant could not furnish even when the fact—the proof of which was required of him—was true. Before any court is justified in giving to the law a construction that will lead to such a conclusion, it must be convinced that the word and terms used admit of no other construction. Dw. on Stat., 536, 540; Churchill *vs.* Crease, 5 Brougham, 178; and Torrington *vs.* Hargroves, ib., 492; in Rex *vs.* Smith, Douglas 141, it was held that "it cannot be presumed that the statute was to have a retrospect so as to take away a right of action which the plaintiff was entitled to before the time of its commencement; *vide* Attorney General *vs.* Loyd, 3 Atk., 541; Same *vs.* Andrews, 1 Ves. Sen., 225. This is the settled doctrine of this court in McEwin *vs.* Bulkley, 26 How., 242; Harris *vs.* Tyler, 3 Wall, 329.

If this act laid any additional grounds of forfeiture, or imposed new conditions of recovery, or new rules of evidence, operating as a punishment for past offences, it would be an infraction of the provisions of the Constitution against *ex post facto* laws. But we do not think that this section can, in accordance with the settled rules of interpretation, be held to have intended to introduce any new condition of recovery, or shift the burden of proof.

The requirement of the act of March 12, 1863, that claimant should prove "*ownership*" at the time of capture, could not require him to prove the loyalty of his vendors. All that this act required of him, so far as the validity of the sale to him was concerned, was that he should show that all the legal requisites of a sale were complied with. When he had done this, if the sale was rendered illegal or void by the disloyalty of the vendor,

as a penalty, then it was the duty of the party asserting it to prove it, and the burden was on him. The burden of proof, in such case, would rest on him under all the rules of evidence. To prove that any party was disloyal to the Government involves a criminal intent, and the law implying innocence, the affirmative, or loyalty, is presumed unless a contrary presumption is raised by statute, (1 Greenleaf, sections 34, 35,) and we have shown that the presumption raised by the 3d section of the act of January 25, 1868, does not apply in this case.

Starkie on Evidence, pp. 586–7, says: "The law operates by annexing some defined consequences to some defined state of things, and that to put the law in motion it is essential that the suitor should establish a state of things as warrants such legal inference. When issue is joined between the parties, the question, as regards the onus of proof, is which of them has alleged the existence of a state of things essential to his claim or defence. If he does not establish it by some competent means, it remains unproved, and *ex hypothese* that party must fail. Here the claimant has proven all the legal requisites of a sale to him, and the legal inference is that he is the owner, and if the defence seeks to avoid this inference by asserting that those through whom claimant derived title were disloyal, the burden of proof is on him to prove it. (Gray *vs.* Gardner, 17 Mass., 188; Attleborough *vs.* Middleborough, 10 Peck, 378; Davis *vs.* Janney, 1 Met., 221; Powers *vs.* Russel, 13 Peck, 69; and authorities cited in Starkie on Evidence, page 588.)

Another argument why it could never have been the intent of the act of March 12, 1863, to require proof, on the part of either claimant or defendant, of the loyalty or disloyalty of all the parties through whom title was derived to the loyal owner, after September, 1862, is derived from the inconvenience and, in many cases, the impossibility of such a thing, for if the burden of proof is on the claimant, then he would have to trace his title back through all the parties who may have bought and sold the property after the aforesaid dates, and it might often be necessary to prove the loyalty of twenty or more persons, scattered throughout the whole of the insurrectionary district, and in many cases

it would have been impossible even to ascertain the names and residences of the parties. This the law could never have intended, for it is a maxim, *lex neminem cogit ad vana seu impossibilia*. No text imposing obligations is to be construed as imposing impossible things. (Sedgwick Stat. and Con. Law, p. —.) By such a requirement the very object of the act of 1863, which was remedial, and the policy of which was to reward those who had remained loyal throughout the war by restoring to them the proceeds of their property, which was in the Treasury of the United States, would have been defeated, and they would have been deprived of the benefit of the act.

On the other hand it would in many cases be equally difficult or impossible for the Government to furnish such proof of the disloyalty of all such prior vendors of the property. It was evidently not the intention of the act that any inquiry should be made as to the loyalty of such persons, but only as to that of the claimant himself, as by the act of March 12, 1863, he was not required to aver and prove the loyalty of any one but himself.

Let us suppose that this Court should hold that the Court of Claims should find a sale of property made by claimant's vendor to be void from the fact that such vendor was disloyal and came within the class described in the act of July 17, 1862, and that such sale passed no title, and this on proof furnished to that Court by the claimant, where the vendor had no opportunity to offer any evidence as to his loyalty, and that said vendor had taken the note of claimant for the purchase money of the cotton, and should now bring suit in the State court upon the note against the vendee or claimant. This Court then, having held that the Court of Claims had authority to find such sale void on such proof of disloyalty, or on such presumption of disloyalty, would this finding be a bar in a State court to the recovery on the note? If so, then, although the vendor might really have been loyal throughout the whole rebellion, and consistently adhered to the Federal cause, and served in the Federal army, still this finding, on proof furnished in a suit in which he had no chance to be heard, must conclude

him, and thus deprive him of his property by proceedings to which he was not a party. If the State court could go into the question of his loyalty after the finding of this Court, and give judgment against the vendee or claimant for the purchase money, we might then have the decision of the State court and of the Court of Claims in direct conflict, the Court of Claims holding that the claimant never acquired title to the property, and on that ground defeating his recovery of the proceeds, and the State court compelling him to pay for it on the ground that the vendor was loyal, and that the sale passed a valid title. It seems unreasonable to suppose that Congress intended to make a rule capable of producing such a result.

UNCONSTITUTIONALITY OF THE ACT JULY 17, 1862.

We have thus far considered the validity of the title of the loyal owner and claimant, as affected by the sixth section of the act of July 17, 1862, the construction of that section, the effect of the President's pardon and amnesty, and of subsequent statutes modifying and repealing this statute, and the burden of proof as to the loyalty or disloyalty of those through whom claimant derived his title. We have done this on the supposition that this act was constitutional and valid, but we maintain that the sixth section of this act containing this clause as to sales and transfers, and the other sections relating to the seizure, confiscation, and sale of property in the manner therein prescribed—which alone it is necessary for us to consider—are null and void, as being the exercise of legislative power which Congress did not possess under the law of nations or the Constitution of the United States, but which was expressly denied and forbidden by the provisions of that instrument.

This act, we maintain, is unconstitutional and void, and cannot be sustained as being the exercise of belligerent rights, or under the so-called war power of the Government. Its validity is a question of internal or constitutional, and not of international law; but even if it were to be tested by the principles of international law, it must be held void, as being contrary to the

modern usages of war, the weight of modern authority, and the principles of international law, as laid down by modern elementary writers.

As to the authority of Congress under the Constitution to pass such an act—such power is not given by any clause in the Constitution, either expressly or impliedly; but, on the contrary, is denied to Congress by the express provisions of that instrument.

First. There is no provision in the Constitution under which Congress can claim the authority to pass such an act.

It cannot be sustained under the provision of the Constitution giving Congress power to prescribe punishment for treason or other crimes, for the act contemplates the seizure and condemnation of such property without presentment or indictment by a grand jury, or arrest and conviction of the owner, but only on such evidence of guilt as would be sufficient proof of any fact in proceedings in admiralty. The Constitution prescribes a trial of this and other crimes in a manner entirely different from that prescribed by this act. In the case of the Amy Warwick, (Law Reporter, June, 1862, p. 498,) Judge Sprague says:

"Confiscations of property not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive, and punishment should be inflicted only upon due conviction of personal guilt; what offences and what penalties shall be affixed must be left to the justice and wisdom of Congress, within the limits prescribed by the Constitution. Such penal enactments have no connection whatever with the decisions of prize courts enforcing belligerent rights upon property captured at sea during war."

The proceeding contemplated under this act is a mere legal trick to strip citizens of their property without judicial proceedings by calling it a proceeding *in rem*. The cases in which it has been held that property whose owner has attempted to violate blockade or revenue laws may be forfeited by proceedings *in rem* have no bearing. The doctrine, there, is that "the thing is primarily the offender, or rather, the offence is primarily

attached to the thing." (Per Story, J., the Palmyra, 12 Wheaton, 14.) Here it is the offence of the owner, irrespective of the property, and Congress cannot punish this offence, under the power given to declare the punishment of treason, for the reasons before given. By this same act the citizen was made amenable to a criminal prosecution which, after his property had been confiscated, might result in his acquittal by a jury of a State and district in which the offence might be alleged to have been committed.

The power to pass such an act cannot be claimed under the power given to Congress to make rules concerning captures on land and water, for this relates only to war with foreign nations, as decided in this Court in the case of the Brilliant *vs.* the United States. (2 Am. L. R.)

Nor can this act be sustained on the ground that the proceeds of the confiscation of such property is to be applied to the support of the army, under the power given Congress to suppress insurrection; for the Constitution does not recognize military necessity for taking private property for public use. The right of Congress to make war on rebels under this provision of the Constitution to provide for calling forth the militia, execute the laws, suppress insurrection, and repel invasion; gives power only to perform acts of war, and no others. Because the property of rebels might be taken in certain cases as a purely military necessity, and as an act of war, that cannot authorize the taking of all their property by legislative enactment when such necessity does not exist, for the property of loyal persons might be taken also in case of military necessity, and as an act of war.

2d. The power to pass this act is not only unauthorized by the Constitution, but expressly forbidden by its provisions.

It is forbidden by the provision (Amendment, Article 5,) that no person shall be held to answer for a capital or other crime without presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without just compensation; and by the provision that the ac-

cused shall be confronted with witnesses against him. Again, the Constitution provides (sixth amendment) that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation," &c. If this was a criminal prosecution, Congress could not change a matter of criminal or common law jurisdiction into one of civil or admiralty jurisdiction. (Murray's Lessee *et al. vs.* Hoboken Land and Improvement Co., 18 How., 284. Cummins *vs.* State of Missouri, 4 Wall, 277. *Ex parte* Milligan, 4 *ib.* 2. Morris *vs.* Doniphan, 4 Metcalf, Ky., 385.)

And whether a criminal or civil prosecution, the citizen cannot, under the provisions of the Constitution and the common law, be deprived of his property without a trial by jury. If the case be one of common law jurisdiction, the issues of fact must be tried by a jury and not by the court. (Seventh Amendment. Armstrong Foundry cases, 6 Wall., 766. United States *vs.* Hart, 6 Wall., 770. Union Ins. Co. *vs.* United States, 6 Wall., 759. Confiscation cases, 7 Wall., 462.) (In this case the Government seeks the benefits of the provisions of this penal statute, without libel or information, without trial by jury, or even notice to the party or a hearing.)

It is forbidden by the provision (Article 1, Section 9,) that Congress shall pass no "bill of attainder;" for these words should be construed in no technical sense, but be considered as the enunciation of a great principle.

It is forbidden by the provision (Article 3, Section 2,) that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted, meaning a judicial attainder as attainder by act of legislature was forbidden by the section just quoted.

The Constitution of the United States, then, not only contains no provision granting to Congress, either expressly or impliedly, the authority to pass such an act, but expressly provides against such an enactment. There is no principle better settled by the

decisions of this Court than this, that the Federal Government is one of delegated and limited powers, and that all powers not delegated to it or inhibited to the States, are reserved to the States or to the people. (11 Pet., 258, &c.) In fact, this principle is made a part of the Constitution itself. (Amend., art. 10.) Under the American theory the United States Government is just what its Constitution declares it to be, and has no other being or existence whatever. It is vested by the people with certain and definite powers. It is supreme within its prescribed sphere over the people of the whole land; beyond its sphere it is a legal nonenity, destitute of all power and rightful authority or legal existence. If the Government has powers not granted by the Constitution, whence does it derive them? By what organic act of the people is such grant evidenced? This act being without constitutional sanction is void, for such acts have always been pronounced void. Any other hypothesis would convert all limited agencies into absolute control over the principal's rights.

We maintain that Congress has not the authority to pass such an act, as being the exercise of belligerent rights superadded by a state of civil war, and if such rights are superadded, it is only such as do not conflict with the Constitution. The Constitution of the United States was designed by its framers to be perpetual, and it preserves its vitality during rebellion as well as foreign wars. Judge Treat, in his opinion in United States *vs.* 269½ Bales Cotton, says that it is a narrow view of the Constitution to hold that it is unequal to the work of self-preservation against all forms of opposition, and that its powers are not, when rightly construed and applied, equal to every emergency. If it is held that the Government receives new or extra constitutional or unconstitutional powers from the existence of war of any kind, then an act of insurrection *ipso facto* overthrows the Constitution of the United States as the organic and supreme law, and becomes a success. The moment it is assailed it passes out of existence. The resistance to be overcome leaves no constitutional power to be exercised against it, if it ceases to be obligatory because it is assailed. Such a doctrine as this seems almost too absurd to be refuted. The Constitution must be the supreme law within the

territorial limits of the United States, supreme over all statutes, compacts, ordinances, orders, or decrees in war, civil or foreign, as well as in peace. It is the supreme law which the people in their sovereign capacity have proclaimed their safety requires.

The Constitution prescribes the mode of trying citizens charged with levying war against the United States, the place of trial, and limits the punishment; and this fact proves that its framers did not contemplate a suspension of its provisions by civil war, nor a denial even to traitors of its guarantees, nor the exercise over them of powers which it does not confer. The war power cannot destroy any limitations on the power of the Government, except in cases expressly provided for, as in regard to the suspension of the *habeas corpus* act, and permitting the quartering of soldiers in a house without the consent of the owner in time of war, in a manner prescribed by law.

The Constitution gives to Congress the power to provide for calling forth the militia, to execute the laws of the Union, suppress insurrection, and repel invasion; raise and support armies, and provide and maintain a navy. And treason is defined to consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort. In these clauses internal or domestic war is referred to, as well as foreign war. Resistance to the execution of the laws, insurrection, and levying war, which may call for military action, are as distinctly provided against, when made by American subjects, as are invasions or foreign wars. But it cannot be contended that, under these or any other granted powers, the United States Government derives authority, whilst repelling an invasion or insurrection, to disregard all the prohibitions contained in the Constitution; that by force of the necessity springing from such invasion or insurrection, it is at liberty to transcend all limits upon its intra-territorial or municipal control over the lives, liberties, and property of its own citizens. The power to suppress insurrection, being a constitutional grant, must be exercised within constitutional provisions.

The law of nations if it applied to the late rebellion could not convert a limited into an unlimited sovereignty or confer on this

Government any power, the exercise of which is prohibited by the Constitution, or which is inconsistent with the nature of the Government established thereby. All military operations then for the suppression of the rebellion should be limited both by the rules of modern, civilized warfare, and the provisions of the Constitution: and no belligerent rights can be exercised under the law of nations which conflict with the provisions of the Constitution. So long as the insurrectionary organization is treated as rebellious, instead of being recognized as an independent government, so long the Constitution, and not international law must be the rule of action. So long it is not an enemy country, and none of the international doctrines with reference to such a country can have any application. Rutherforth, in his Institutes, says:

"The act of the people, however injurious it may be, will not increase the power of the sovereign, nor will it give him a right to any more power than the Constitution has given him, for the sovereign power was originally vested in the collective body of society called the people. The sovereign cannot of right claim any greater part of it than the people have granted to him by compact in forming the Constitution. * * * He can only claim to continue the Constitution, though the people should causelessly and wrongfully invade his part. This is the whole of his right, and no event whatever can give him a more extensive right without the consent of the people. If the struggle between him and them should end in civil war, and victory should declare on his side, yet conquest will not of right increase his power, however strongly we may put the case in his favor by supposing the breach of the Constitution to have begun from the people and the whole blame of the war to rest on them. For the use of force, though it should be superior to the force opposed to it, only serves to support a right which might otherwise have been hindered from taking effect. It does not produce a right where there was none before."

Although, according to the principle announced in Rose *vs.* Himely, (4 Cranch, 241,) belligerent rights are superadded to municipal sovereignty, neither this decision nor any of the following decisions repeating it (6 Cranch, 281; 7 Wheat., 283; 3 Wh., 246, 610; 4 Wh., 52, 497; 14 How., 384; 6 Wh., 191;

9 How., 603) declare that full belligerent rights over the rebellious citizens are superadded to the municipal rights of the Government by civil war, and that it can treat those in rebellion both as alien enemies and rebellious citizens, and that the rights given by the law of nations supersede those given by the Constitution.

In the case of the Brilliant *vs.* the United States, before referred to, it was declared that all persons residing in the rebellious States "whose property may be used to increase the revenues of the hostile power are in this contest to be treated as enemies, *not as foreigners*. Every sovereign has, for the purposes of municipal administration, municipal sovereignty more or less limited by the domestic constitution of his country, and at the same time, for the purposes of foreign or international intercourse, full and complete rights peaceful and belligerent. As to all foreign nations, the United States Government during the rebellion might exercise the fullest rights of belligerency when occasion required. It might often be necessary for the Government at the same period of time to exercise both intra-territorial and extra-territorial powers, the one as to its own citizens and the other as to neutrals or foreign nations. Hence, in the late rebellion, so far as foreign nations are concerned, the United States was a belligerent power and exercising belligerent rights. The doctrine of superadded belligerent rights then does not justify or excuse unconstitutional action in the internal administration of affairs, nor does the decision in Rose *vs.* Himely, or those following it, sustain any such view.

This act blends all distinctions between the belligerent and municipal rights of the Government over citizens of the rebellious States, and proposes to enforce rights founded exclusively, if they exist at all, on war, through process applicable to times of peace.

Judge Sprague, in the case of the Amy and her cargo, held, in accordance with immutable principles, that no sovereign can acquire the rights of a conqueror over his own lawful dominions, and especially is this true in constitutional governments; and again he says, "under despotic governments the power of

municipal confiscation may be unlimited, but under our Government the right of sovereignty over any portion of a State is given and limited by the Constitution." And again he says "that a State and its inhabitants may be treated as foreign territory acquired by arms is a grave and dangerous error. No nation ever makes such a conquest of its own territory, nor acquires new sovereignty, but merely maintains its previous rights." How can the Government of the United States rightfully abdicate or abandon any of its duties under the Constitution in any part of the country? It cannot exercise the belligerent rights of a foreign conqueror over any portion of the country subject to the Constitution and the laws. If Congress can go beyond the Constitution, and exercise all the rights of conquest over the Southern States which an independent sovereign can over another foreign enemy, and adopt any policy for the avowed purpose of subduing them, why may it not adopt any policy to hold them in subjection? If this doctrine is carried out, it would enable Congress to establish monarchical or despotic governments in the Southern States, or do any other acts equally inconsistent with the express provisions of the Constitution.

In Texas *vs.* White, 7 Wallace, this Court held that during the rebellion the Southern States did not cease to be States of the Union, nor their citizens, citizens of the Union. If so, then the Constitution was certainly in force during the rebellion in all its provisions, and all the citizens of the rebellious States, the loyal and the disloyal, were entitled to the benefit of all its muniments and safeguards.

This act cannot be sustained under the principles of international law, even if it should be held that the Government possessed full belligerent rights over the citizens of rebellious States in addition to its municipal rights, and that it could treat the rebel States as conquered territory and their citizens as alien enemies. The case of Brown *vs.* the United States (8 Cranch) seemed to decide that public war gives to the sovereign the right to confiscate the property of the enemy wherever found, but the court decided in that case that the modern usages of war were

against the exercise of this rigid rule. The views expressed by this Court in subsequent cases seem to be wholly irreconcilable with such extreme doctrine, and our diplomatic history is based on an entirely different theory. Wheaton (International Law, p. 244, *et seq.*,) says the modern rule of international usage appears to be that property of the enemy found within the territory of a belligerent State, or debts due to his subjects by the Government or individuals at the commencement of hostilities, are not liable to be seized and confiscated. The following authorities also sustain this view: Bell *vs.* Chapman, 10 John., 183; Hutchinson *vs.* Brook, 11 Mass., 119; Lawrence's Wheat. International Law, 596, sec. 5. Kent, also, (vol. 1, p. 91,) says that the modern usages of war and the weight of authority are against such a right, and commenting on this rule as stated in Brown *vs.* the United States, speaks of it as the ancient and sterner rule, and that the doctrine of that case is against the weight of modern authority. (See Martens, pp. 288, *et seq.* Vattel, 364. Polson, 38 *et seq.* Wildman, 9. Wheaton's Elements, 344, 395. Treaties between the United States and Great Britain of 1783 and 1814; between Great Britain and France in 1786; of Amiens and of Paris, March 30, 1814. Pilkington's case, 2 Knapp's Priv. Counncil Rep, 7. Solom's case, *ib.* 350. Borden's case, *ib.* 353. Genesis' case, *ib.* 345. De Tartel's case, *ib.* 358. Johnston's case, *ib.* 336. Madison's Papers, pp. 91, 105, 103, 144, 148, 235, 239, 490, 575, 735, 854, 866, 740, 1226, 1232, 1347, 1550, 1612.)

In 7 Peters' Rep., 86, Chief Justice Marshal says:

"It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled." Peters' Rep., vol. vii, p. 86, U. S. *vs.* Percheman; Phillemore's International Law, vol. iii, p. 743.

The following authorities bear on this subject: 1 Pet., 542;

3 Pet., 122; 4 Pet., 511; 7 Wheat., 104; 10 Pet., 720–9; 9 Pet., 137, 147, 733; 9 Howard, 603; 16 How., 164; also, 3 Cal. Rep., 445; 8 Ib., 165; 15 Ib., 559; 16 Ib., 22; 3 Phill., 118.

That this act is contrary to the modern usages of war and of civilized nations, there can be no doubt. The Spanish Constitution, (Art. 10,) provides that the penalty of confiscation shall never be imposed; and also the Constitution of Belgium, (Code Civil Belge, p. 2.) In France, the charter of 1814 says, the punishment by confiscation of property shall never be established. This concurrence of most, if not all countries, in prohibiting confiscations of property, even for political offences, would seem to give the opposite policy the sanction of universal law.

The rights of general war, as fixed by the law of nations, forms part of our Constitution, and Congress cannot control them. Blackstone (vol. 4, 66) says:

"The law of nations is held to be part of the laws of the land, and those acts of Parliament made from time to time to enforce this universal law of nations is to be construed, not as introducing any new rule, but merely as declaratory of the old fundamental Constitution of the kingdom, without which it must cease to be a part of the civilized world."

But we think that it is not necessary to consider the validity of this act as a question coming under the law of nations, but simply as one of constitutional or municipal law. It is impossible in such a civil war as ours was, where the people of the same district, towns, and even households were divided, to treat the revolting party or faction as an independent nation and apply all the rules of international law.

This act declares that this liability to confiscation shall apply to the property of all persons who shall not within sixty days, &c., cease to aid, countenance and abet such rebellion, but does not say voluntarily aid or abet, thus making no provision for loyal persons in insurrectionary districts, from which the protection of the Government was withdrawn, who rendered, in accordance with the doctrine of *de facto* governments, temporary

obedience to the rebel authorities, including the performance of judicial and other public duties. This doctrine of *de facto* governments being that when an usurper is in possession, the subject is excused and justified in obeying and giving him assistance. Stephen's Blackstone, iv, 221; Gallison's Reps., vol. II, 500; United States *vs.* Haywood, Story, J., Lawrences' Wheaton, 2, Annot'd Ed., 525; Forster Crown Law, 399; 3 Inst., 7; 4 Wheat., 246, 254; 9 Cranch, 191; 3 Peters, 99, 242; 9 Howard, 603, 615.

If the law of nations governed the relations of the parties in the late contest, it gave to each belligerent the same rights. If it gave to the Federal Government the right as a belligerent to confiscate real and personal property on land of rebels, it gave the Confederate Government the same right to confiscate property of citizens of loyal States, and to pass valid titles, which could not be annulled by the United States courts after the suppression of the rebellion.

According to the doctrine in Texas *vs.* White, the States in insurrection were States in the Union, and their citizens citizens of the United States, and all acts of those State governments should be regarded as valid which were necessary to peace and good order among its citizens; amongst others, acts regulating the conveyance and transfer of property, real and personal. If these acts were valid, the transfers and conveyances made under them were valid, for the transfers of which we have been speaking could not be considered as "acts in furtherance of the rebellion or to defeat the just rights of the citizens." Under the Constitution the States have the control of their own internal affairs, and the authority and the right to pass all such acts, regulating the transfer of property, descents, &c., and the citizens of those States derive rights under those laws which Congress cannot constitutionally deprive them of by legislation.

If this act is valid, then under its provisions every transfer of property of every description, real and personal, money, stocks, and credits, made after a certain date, by nearly the entire population of ten States, could be declared void, and their entire property liable to be seized, condemned, and sold. It was, if carried

out, not only to punish the guilty offender, but to deprive innocent children, the infant, the orphan, and the widow, of the means of subsistence. No person coming within its provisions could make a valid contract for even the necessaries of life. The money or the property he paid for them could be seized and the sale declared void. Such an act as this, and which, if carried out, would lead to such results, is contrary to all natural and revealed law; contrary alike to the true policy of all governments; it violates all sense of justice and of right; is against the dictates of humanity and the very instincts of mankind; and is unparalleled in the history of the modern legislation of civilized nations.

NON-INTERCOURSE ACTS.

The cotton, the proceeds of which are in question, was purchased during the rebellion, from January to April 1st, 1863, by an agent of the claimants, residing within the confederacy, and therefore was not a violation of the non-intercourse act.

A citizen of a country at war with another may have an agent in the enemy's country, and may enforce the contracts or accept the beneficial acts of his agent after peace; and, in this respect, he may do by an agent what he could not do himself.

Conn. *vs.* Penn., 1 Pet., C. C. R., 496.
Deniston *vs.* Imbrie, 3 Wash., C. C. R., 396.
Paul *vs.* Christie, 4 Har. & McH., 161.
Buchanan *vs.* Curry, 19 Johns. R., 137.
Ward *vs.* Smith, 7 Wal. R., 452.

(*a.*) "He," says Emerigon, "who on the public faith has come among us to trade, or for other lawful cause, is not to be treated as an enemy simply because war breaks out between his nation and our own. The credits that a foreigner has amongst us, at the time of the declaration of war, remain entire. If forced himself to withdraw, he is allowed to leave his procuration with a friend to demand what is due to him." (Emerigon's Treatise on Insurance, by Meredith, ch. xii, sec. 35, p. 438.)

(*b.*) In Buchanan *vs.* Curry, (19 Johns. R., 137,) it was held that a contract for the delivery of lumber, made before the war of 1812, with one who, by the war, became an alien enemy, might be lawfully executed during the war by delivering the lumber to his agent within our territory.

The court declared in this case that it was not unlawful voluntarily to pay debts or perform contracts to alien enemies, if the payment be made or the duty be performed in our own country. That the rule forbids during war that money or other resources shall be transferred, so as to aid or strengthen our enemies. That the crime consists in exporting the money or property, or placing it in the power of the enemy, not in delivering it to an alien enemy, or his agent, residing under the control of our Government, (p. 141.)

(*c.*) The right of an alien enemy to have an agent in our country during war, to act for him, receive his credits, &c., is fully established in the case of Ward *vs.* Smith, 7 Wal., 452.

(*d.*) In the case of Potts *vs.* Bell, (8 Term R., 548,) it is admitted that an agent domiciled in the enemy's country might purchase property and hold it for his principal, but that he could not lawfully attempt to send or ship it out to the principal.

That Grossmayer had the right to have an agent in the Confederacy during the insurrection, and the right to avail himself of his beneficial acts, seems to be established by these authorities.

The Court of Claims finds as a fact that Einstein was Grossmayer's agent, and that he purchased the cotton in question for his principal; but the Court also finds that he (Einstein) purchased the cotton in pursuance of the direction which Grossmayer communicated to Einstein by the witness, who passed

back and forth several times during the war. Upon this finding the Government denies the agency of Einstein, because the message was in violation of the non-intercourse act, and therefore illegal, and as such could not legally authorize the agent to act in his behalf. And as the agent had no legal authority to make the purchase for Grossmayer, the whole transaction was a nullity, and no title passed.

In reply to this argument, we submit that the message was sent by a messenger who was permitted to cross and recross the military lines, and that that kind of communication was not only not forbidden, but it was permitted by the proper authorities. The commercial intercourse prohibited by the President's proclamation of August 16, 1861, was described to be and was confined to a locomotive intercourse; that all goods and chattels, wares and merchandise, coming from such States or sections into the other parts of the United States, and that all such goods, &c., proceeding to such States or sections by land or water without the license specified shall, together with the vessel, &c., be forfeited to the United States. (12 Stat., p. 281, 1262.) This proclamation was in strict conformity to the act of July 13, 1861, by virtue of which it was issued. The act says "and thereupon,"—that is, after the said proclamation shall have been issued—"all commercial intercourse by and between the same (the insurrectionary districts) and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue, and all goods and chattels, wares and merchandise coming from said State or section by land or water shall be forfeited to the United States. "*Provided*, that the President may, in his discretion, license and permit commercial intercourse," &c., under rules prescribed by the Secretary of the Treasury. Following the proclamation of August 16th, 1861, the President issued his proclamation of February 28th, 1862, authorizing a partial restoration of commercial intercourse between the two sections, in which he said: "Considering that the existing circumstances of the country allow a partial restoration of commercial intercourse be-

tween the inhabitants of those parts of the United States heretofore declared in insurrection and the citizens of the loyal States of the Union, and exercising the authority and discretion confided to me by the act of Congress approved July 13, 1861, entitled," &c., "I hereby license and permit such commercial intercourse in all cases within the rules and regulations which have been or may be prescribed by the Secretary of the Treasury," &c. Under and by virtue of this proclamation, the Hon. Secretary of the Treasury issued his regulations of August 28, 1862, "for the purpose of preventing the conveyance of arms, munitions of war, and other supplies to persons in insurrection against the United States." These regulations, following the language and spirit of the act of July 13, 1861, and also the proclamation of the President of February 28, 1862, declare that no goods, wares, or merchandise, &c., shall be transported to any place under the control of the insurgents, &c., thus from the beginning to the end confining the prohibition to locomotive intercourse, or the exchange of articles of merchandise, and the only prohibition against the purchase of cotton is contained in the second paragraph, where it is said that cotton shall not be paid for in gold or silver. It will be said that there is no express permission in these regulations to purchase cotton except under a license, true—but we reply that there is no express prohibition in these regulations; and that the President's proclamation declared "that the existing circumstances of the country allowed a partial restoration of commercial intercourse between the two sections, and the only prohibition was against the transportation of goods, &c., into the insurrectionary districts." It must be remembered that the purchase of this cotton was made from January to the first of April, 1863, and prior to the President's proclamation of the 31st day of March, 1863, in which he revoked the exceptions made in his previous proclamation; and the purchase was prior to the commercial regulations of the Treasury Department, dated the 31st day of March, 1863, whereby all commercial intercourse was prohibited except under and by virtue of a license duly granted.

We submit, therefore, that these acts and proclamation, de-

fined the "commercial intercourse as a locomotive intercourse as understood in the law of nations, but that they recognized the difference in a war between independent nations, and that between the citizens and the subjects of the same government. The line of demarcation was not so closely drawn. Parties passed and repassed, and whole mails were sent across the lines by flags of truce. The steamer engaged by the Government in the exchange of prisoners between Norfolk and Fortress Monroe, carried a weekly mail between the citizens of the two sections, and the only limitation was, that no information concerning the Government, or its military operations should be communicated. With these facts in view, and in the absence of any thing in the commercial regulations forbidding it; can it be held that the message of Grossmayer to his agent was a crime for which he ought to be punished, with a forfeiture of his property? It seems to me that it would be impossible for the most sensitive olfactory in the whole range of Government officials to detect a taint in such a transaction. Not only was there no violation of law, municipal or national, but the facts show, that there was no intention to violate the non-intercourse act, or what is still more important, to violate the sacred obligations of duty to his country.

Under these circumstances, we submit that the severe rules of non-intercourse, recognized between independent nations during war, cannot be applied in this case. Such an application would conflict with the policy and spirit of the Government throughout the entire period of the rebellion. By the *jus gentium*, no distinction is made between the citizens or residents of the enemy's territory. All are enemies, and all are equally liable to the penalties of war; but, during the rebellion, everything possible having in view the public safety was done to protect the rights and property of the loyal citizen, without regard to his domicil. The confiscation acts of 1861 and 1862 were superceded by the more humane and liberal act of March 12, 1863, in which the Government declared itself their trustee, and pledged its faith to hold their property for them.

But we are told that our rights were forfeited by an illegal

message sent to an agent to purchase the cotton; that this was criminal commercial intercourse, and tainted the whole transaction. Now if, for the sake of argument, we admit that the message was illegal, what did it taint? What is null and void by reason of this illegal message? All that can be claimed is that it conveyed no authority to the agent to act for Grossmayer; that the message being illegal, we could confer no authority by it, and that Einstein therefore acted without authority. It did not extend to and taint the contract of purchase made by Einstein, for this he had a legal right to make. He resided in the confederacy, and could legally purchase from any one residing there. The contract of purchase there was not tainted by this message, even though you admit its illegality. Now if Einstein had no authority, he voluntarily acted for Grossmayer. He was the debtor, and saw the necessity of purchasing this cotton to protect the interests of his creditor; and this he might legally do with the consent of his creditor, or subject to his ratification.

A debtor may, in good faith, specifically appropriate property to the creditor in payment of an indebtedness, and when the property is distinguished and set apart for such purpose, or put upon its transit, or any other act is done to give effect to his intention, and nothing is done to recall or reconsider the act, the title passes.

Ogle *vs.* Atk., 5 Taunt., 759.
Mitchel *vs.* Edes, A & Ellis, 388.
Fowler *vs.* Devons, 1 Bos. and P., 47.
Vertue *vs.* Sewell, 4 Camp., 31.
Anderson *vs.* Scott, 1 Id. 235, and note.
Bryan *vs.* Nix, 4 M. and W., 775.
Anderson *vs.* Clark, 2 Bing., 20.
Mason *vs.* Lickbarrow, 1 H. Bl., 365.
Bignell *vs.* Ellis, 5 M. and By., 165.
Flagano *vs.* Long, 4 B. and Cr., 219.
Phillips *vs.* Affold, 4 M. and Gra., 844.
Coit *vs.* Houston, 3 John. Cases, 243, and remarks upon it in 19 Wend., 517.
Wilkes *vs.* Ferris, 5 John, 325.
DeWolf *vs.* Gardiner, 12 Cush., 19.

Einstein purchased this cotton for his creditor, Grossmayer, separated it from his own cotton, and afterwards shipped it to Savannah, and directed his agent there to store it for Grossmayer, and hold it until the end of the war; and we hold that this was a specific appropriation; and that Einstein did all he could possibly do to distinguish the property and vest the title in Grossmayer; and no act was done to show that he recalled or reconsidered his act.

These acts of Einstein were fully and distinctly ratified by Grossmayer, and the ratification reverts back, and is equivalent to a previous permission or command. *Omnis ratihabitio retrotrahitur et mandato acquiparatur.* (Co. Litt., 207; Wingate, 485; Story's Agency, sec. 244.) The intervening seizure by the Government did not affect his rights. The seizure was not in hostility to his claim, but was made for his benefit, under the act of 12th March, 1863. By that act the Government did not take title by virtue of the seizure, but declared that it held the proceeds of the property taken in trust for and subject to the claims of loyal citizens; and Grossmayer now claims his right to the proceeds under that act.

(*a.*) It was held in Hagedorn *vs.* Oliverson (2 Maule & Selw., p. 485) that a ratification of the act of an unauthorized agent in effecting an insurance is good, and reverts back, though the ratification is not given by the principal until after he knows that the property insured was lost by a capture upon the high seas. (And see Story's Agency, sec. 248.)

(*b.*) Claiming the cotton and instituting a suit for it, is in itself a sufficient ratification. (Billow *vs.* Hyde, 1 Atk., 128; Wilson *vs.* Poulter, 2 Sh., 859; Smith *vs.* Hodgson, 4 T. R., 211; Coke Litt., 258*a*; Paley on Agency, 315; Story's Agency, sec. 252–259.)

This view of the case relieves us of the objection urged against the message; but we think that the message cannot be treated as illegal. If the law permits one to have an agent in

an enemy's country, for the collection of his credits and safe keeping of his property, an entirely innocent request sent to that agent cannot be held to be criminal; and especially so when the commercial regulations and policy of the Government justify it.

This case differs in almost every respect from the Ouachita cotton cases, decided in 6 Wall., 521. In that case Queyrous purchased the cotton directly from Buchner, the confederate cotton agent, in March, 1864, in view of the strict non-intercourse prescribed by the regulations of September 10th, 1863. The bank sent its money *into* the confederacy, and purchased the cotton claims in August, 1863, and Withenbury & Doyle made their purchase from the confederate cotton agent, McKee, in August, 1863, and after the Government had seized the property, and proceeded to condemn it under the act of July 17, 1862, these parties came into court to seek the benefit of a contract made under such circumstances. In this case the claimant sent nothing into the confederacy, entered into no contract with persons across the lines, or with an alien enemy, the message sent to the debtor contemplated an entire acquiescence in the non-intercourse act, and looked only to the protection of an existing claim, and the retention of the property within the enemies lines until the close of the war. The Government, under the act of 12th March, 1863, waives all right to confiscate the property of loyal citizens, and has made no other condition than that the claimant shall establish his loyalty and show title good against everyone else except the Government.

Again, this case has no resemblance to the case of Coppell *vs.* Hall, (7 Wal., 542.) Indeed, that case is without a parallel. The case of McKee, decided the present term of this Court, was similar to the Ouachita case. The purchase was made by a party residing in New Orleans, and after the authority of the United States was fully established there. The cotton was seized and carried to Illinois, and proceedings of condemnation were instituted against it under the statute of July 17, 1862. McKee intervened, and the Court held that the contract with the confederate cotton agent was void because a violation of the non-

intercourse act, and also because the confederate agent could convey no title.

We submit that this case does not fall within the principles established in either of those cases.

In answer to the last points made by the learned counsel representing the Government, we submit that this Court will not go behind the finding of facts returned by the Court of Claims, and that the learned counsel can take nothing by the isolated facts which he had ingrafted in that return.

RULES OF PRACTICE

OF

THE COURT OF CLAIMS

OF THE

UNITED STATES;

THE

ACTS OF CONGRESS ESTABLISHING THE COURT,

AND IN AMENDMENT THEREOF.

1869.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1869.

RULES OF PRACTICE

OF

THE COURT OF CLAIMS

OF THE

UNITED STATES;

THE

ACTS OF CONGRESS ESTABLISHING THE COURT,

AND IN AMENDMENT THEREOF.

1869.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1869.

RULES OF PRACTICE

OF

THE COURT OF CLAIMS.

I.—The Action.

Every claim shall be stated in a petition addressed to the court, and signed by the claimant or his counsel. And there shall be appended to the petition the post office address of the claimant and of his counsel.

II.—The Petition.

The petition will consist of—

1st. The title of the action, wherein shall be set forth the full names of all the parties plaintiff.

2d. A plain, concise statement of the facts and circumstances hereinafter enumerated, giving place and date, free from argumentative and impertinent matter.

3d. The prayer, in which the claimant must state distinctly the amount for which he demands judgment, or the relief to which he may be entitled.

4th. The verification as hereinafter required.

The claimant may append to his petition as exhibits the instruments or documents to which it refers; but such exhibits will not be made evidence thereby, nor the claimant be relieved from proving them should he wish to use them as evidence.

The petition must set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had, specifying also what person or persons are owners thereof, or interested therein, and when and upon what consideration such person or persons became so interested.

In every case where the claim is such as is ordinarily settled in any executive department, the petition shall show that application for its allowance has been made to that department, and without success, and its decision thereon.

If the claim be founded upon any law of Congress, or upon any regulation of an executive department, the act of Congress, and the section thereof upon which the claimant relies, must be stated, and the particular regulation of the department must be specified. If the claim be founded upon any express contract with the government of the United States, such contract must be set forth in the petition, and, if it be in writing, in the words of the contract. If it be founded upon any implied contract, the circumstances upon which the claimant relies as tending to prove a contract must be specified. If it consist of several matters or items, each shall be separately stated or articulated.

The petition shall also set forth that the claimant, if a citizen of the United States, and the original and every prior owner thereof when the claim has been assigned, has at all times borne true allegiance to the government of the United States; and, whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government.

There must be annexed to the petition an affidavit of the claimant, his agent or attorney, stating that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

In all cases where the petition of the claimant shall be signed, and the affidavit thereto shall be made by the agent or attorney of the claimant, there shall be filed with the petition a regular warrant of attorney, duly executed by the claimant or claimants to the party so acting on his behalf. And on failure to file such warrant of attorney the petition will be dismissed.

III.—Departments.

When a petition is filed, the clerk shall transmit a copy thereof to the department or departments having cognizance of the subject-matter of the claim, with a letter stating that such an action has been commenced, and requesting that all the information known to or on file in the department, which may be necessary to protect the interests of the government, be communicated to this court.

If no reply be received within one month, the clerk shall communicate with the head of such department, advising him of such omission to answer.

IV.—Femes Covert, &c.

When a feme covert is a claimant, her husband must be joined with her as a party plaintiff. And where infants, lunatics, or other persons not *sui juris* are claimants, the guardian, trustee, committee, or other proper legal representatives duly appointed by the tribunal having jurisdiction of the person or estate of such persons must be made plaintiffs, and their appointment as such, duly certified, be filed with the petition at the commencement of the action.

V.—Executors, &c.

If the claimant die pending the suit, his proper representatives may, on motion, be admitted to prosecute the claim, upon filing a duly authenticated copy of the letters testamentary or of administration granted to such representatives.

VI.—Discovery.

When the petitioner cannot state his case with the requisite particularity without an examination of papers in one of the executive departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a manuscript petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim. The court will thereupon make a special order calling upon the proper department for such information or papers as it may deem necessary, to be delivered to the clerk of the court to be filed in his office. The manuscript petition may then be amended, and the amended petition printed and filed, and may occupy upon the docket the place of the original petition.

VII.—Orders in Vacation.

In vacation an application for a special order to call upon a department for papers for such purpose, or for information or evidence, may be made to a judge of the court at chambers.

VIII.—Copies of Petition.

The claimant, when, or within ten days after, he files his petition, shall deliver to the clerk *fifteen* printed copies thereof for the use of the judges and the Attorney General. The printed copies must show the clerk's indorsement of the filing of the original, with the date thereof.

IX.—Demurrers and Pleas.

The Solicitor shall demur to or traverse the petition within sixty days after the filing of the same, unless, for special cause shown on motion to the court, or to a judge in vacation at chambers, the time be extended; and he may put in a special defense to the claim at any time before the hearing of the cause.

X.—Grounds of Demurrer.

When the Attorney General demurs to the petition he shall set forth the grounds of the demurrer specially in writing, and file the same of record. But if the ground of demurrer be that the petition does not set forth facts sufficient to constitute a cause of action, that objection may be stated generally.

XI.—Amendment.

After the decision on the special demurrer the claimant may amend, within thirty days, except in cases where the demurrer is sustained on the ground of want of jurisdiction or legal capacity in the claimant to sue, in which cases the petition shall be dismissed.

XII.—Counter Claims, &c.

Where a set-off, counter claim, or other special defense on the part of the United States is set up by the Attorney General, the grounds of such defense shall be distinctly set forth in writing, and filed before the hearing of the cause. And the claimant shall, within thirty days after receiving notice of the filing of the same, file his answer thereto in writing, verified by affidavit.

XIII.—Frauds.

When the Attorney General shall interpose, as a defense to the claim, that the claimant has corruptly practiced, or attempted

to practice, a fraud against the United States in the proof, statement, establishment, or allowance of any claim, or any part thereof, he shall specify in writing, and file the same of record, the grounds and facts upon which the same is based, and which constitute the fraud, or attempted fraud, alleged against the claimant. And the claimant shall, within twenty days after receiving a copy of such specification and notice of the filing of the same, file his answers to the same, verified by affidavit.

XIV.—Dockets.

There shall be kept a general docket, in which an abstract of all the proceedings in each case, with a reference to the papers filed, shall be entered. Also a journal or minute-book, in which the proceedings of the court shall be entered. Motions and interlocutory orders, when made in writing, shall not be entered *in extenso* upon the journal or docket, but an abstract of the same shall be entered, with a reference to the paper filed. There shall also be kept a trial docket, on which the cases for hearing upon testimony shall be entered in the order in which they may be traversed. Cases traversed on the same day shall take precedence according to their seniority. A law docket or list shall also be kept, on which all cases of demurrer, motions for new trials, and all other motions for hearing, in the order in which the demurrers are filed, or the motions made, shall be entered by the clerk.

There shall also be kept a "judgment index," in which an abstract of every final judgment or decree rendered by the court shall be recorded, containing the name or names of the claimants, the number and term of the case, the general docket and page upon which the same is entered, the date and amount of the judgment, the time when the appeal, if any, is entered, the result of the appeal, and the date of *remittitur*, and the date when certified for payment.

XV.—Trial Dockets.

1. The clerk shall keep a docket to be called the "watch book," and the claimant or his counsel may at any time enter his case upon said watch book by a notice, giving its style and number, and stating that the testimony in chief on part of the claimant has been closed, and directing the case to be entered upon the trial docket for the next succeeding term.

2. All such cases so entered upon the watch book at least one month prior to the making up of a trial list, as hereafter provided, shall be placed upon such trial list by the clerk, and in the order in which they stand upon the watch book.

3. No testimony in chief on the part of the claimant will be admitted after a claimant has placed his case upon the watch book, except by order of the court.

4. The trial lists referred to will be made up by the clerk for the first Monday of December, the first Monday of February, and the first Monday of April.

5. The peremptory call of the trial lists will begin on the Tuesday after the first Monday of December, February, and April, of each term. A stated number of cases will be called each day, and those not ready when called will be stricken off of that trial list, or continued for the term, unless, for special cause shown, the court shall order otherwise.

6. Cases in which the counsel reside at a distance may be set down for a day certain, with the consent of the Attorney General, without regard to their position upon the trial docket.

7. All issues of law and motions shall be placed on a law docket, which will be taken up on Monday of each week during the term.

8. Cases marked "continued" are to be understood as continued to the next term of the court, and will be brought on then as if never on the trial list. Cases marked "off" are to be understood as stricken off the trial list, and must be placed by the claimant on a subsequent trial list. Cases marked for February, or any subsequent trial list, will be placed thereon by the clerk without the action of the claimant.

XVI.—Printed Trial List.

The clerk shall furnish printed trial and argument lists to the court from time to time, which shall contain the names of parties and the counsel, and the position of each case.

XVII.—Counsel.

No counsel will be permitted to practice in the court unless he is a man of good moral character, and has been admitted or licensed to practice in the Supreme Court of the United States, or in the highest court of the District of Colum-

bia, or in the highest court of some State or Territory, of which admission he shall furnish evidence satisfactory to the court.

XVIII.—Claimant in pro. per.

Any claimant may appear in person and manage his own case.

XIX.—Commissioner.

The court will appoint permanent commissioners for the taking of testimony, and special commissioners as circumstances may require.

Every permanent commissioner shall take an oath, before he enters upon his duties, that he will faithfully discharge them so long as his commission remains in force; and every special commissioner shall take an oath faithfully to discharge his duties.

The form of a commission to a permanent commissioner shall be as follows:

Court of Claims,

To —— ——, of ——, in the county of ——, and State of ——:
—— ——, esquire:

You are hereby appointed a commissioner, for the term of two years, for the State of ——, to take the testimany of such witnesses as may come before you, to be used in the investigation of such claims as may be presented to this court against the United States. In the performance of this duty you will be guided by the rules of this court. You will take no deposition unless by consent of the parties, until it is shown to you, by the return upon the original notice, that the adverse party has been duly notified; and if he do not appear, you will affix the original notice to your certificate, and return it therewith for the information of the court.

—— ——, *Clerk.*

When special commissions are issued, such variations from the above form as may be necessary will be made. The several judges of the courts of record for the time being in the States and Territories of the United States are hereby appointed commissioners to take testimony to be used in the investigation of claims before this court, in the counties in which they may respectively reside, during the pleasure of this court; and this rule shall be a sufficient commission to each of said judges in the premises. The commissioners appointed by the Circuit and District courts of the United States for the purpose of taking testimony are hereby appointed commissioners to take testimony in the circuits or districts for which they are respectively appointed by such courts.

XX.—Subpœna.

The form of a subpœna shall be as follows:

Court of Claims,

To ——— ———:

You are hereby commanded to appear before ——— ———, commissioner appointed by this court to take depositions, on the ——— day of ———, A. D. 186—, at ——— o'clock in the ———noon, then and there to testify in the case of ——— ——— against the United States, now pending in this court. Fail not of appearance, at your peril.

Dated this —— day of ———, A. D. 186—.

——— ———, *Clerk.*

XXI.—Evidence, (by Deposition.)

The party proposing to take depositions shall cause fifteen days' notice to be given thereof to the Attorney General, or to the claimant or his counsel, as the case may be. The notice must be in writing, and must state the names of the commissioner and of the witnesses, and the day of the month, the hour, and the place of taking the deposition, and must be subscribed by the Attorney General or counsel acting for the United States, or by the claimant or his attorney of record. When the claimant proposes to take a deposition, and the witness resides more than five hundred miles from Washington, or where the Attorney General proposes to take the deposition, and the witness resides more than five hundred miles from the claimant or his counsel, one day's further notice shall be given for every additional hundred miles:

Provided, that if the claimant proposes to take a deposition in the city of Washington, three days' notice shall be sufficient. And a like notice by the Attorney General shall be sufficient when the claimant's attorney or counsel resides in the city of Washington.

Provided, also, that when the Attorney General or his assistant attends in person at the place for taking depositions, the claimant shall not be limited to the examination of the witnesses named in the notice. The same privilege shall extend to the defendants when the counsel for the claimant personally attends. Should the commissioner named in the notice be absent or decline to act, the depositions may be taken before any other person duly qualified to act in the premises.

XXII.—Evidence, (Officer.)

Whenever it is charged in the petition that a contract has been made or other liability incurred through an officer or agent

of the United States other than the head of an executive department, or the chief of the bureau, the claimant will be required to prove that such person was an officer or agent of the United States, by the certificate of the proper executive department, or by other legal and sufficient evidence.

XXIII.—EVIDENCE, (DOCUMENTARY.)

The records, papers, or documents from an executive department which may be offered in evidence by claimant must be those which have been transmitted to the court under a regular call for the same, or otherwise they must be duly certified and authenticated pursuant to the acts of Congress in such cases made and provided. And all such papers must be filed with the clerk before being printed.

XXIV.—EVIDENCE, (DUCES TECUM.)

The court may, at the instance of the solicitor, grant a rule upon any claimant, his agent or attorney, to produce in court, or before any commissioner, any letters, papers, deeds, documents, or other writings in his possession, or subject to his control, in any way relating to said claim; and any claimant, his agent or attorney, who shall, after due notice, refuse to produce such letters, papers, deeds, documents, or other writings, when in his power to do so, shall be subject to attachment for contempt of such order; and, persisting in such refusal, the court will direct the petition to be dismissed.

XXV.—EVIDENCE, (WITNESSES.)

If the witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any commissioner, a rule upon him shall be issued, on motion, to show cause why a fine should not be imposed upon him; and if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.

XXVI.—EVIDENCE, (OATHS, &C.)

All witnesses shall be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, his occupation, his age, if under twenty-one years, his place of residence for the

past year; whether he has any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition, the witness shall state whether he knows of any other matter relative to the claim in question; and if he do, he shall state it. The testimony of the witness when completed shall be read over to him by the commissioner, and be signed by him in the presence of the commissioner.

XXVII.—Evidence, (Deposition.)

The commissioner shall state, in the caption of the deposition, the cause in which it was taken, the place where taken, the name of the witness, the party by whom called, the date, and the names of the parties and counsel present. And in the body of the deposition shall also be shown by whom the witness was examined and cross-examined.

XXVIII.—Evidence, (Deposition.)

In his return the commissioner shall show that the deposition was taken under competent authority; that the witness was properly sworn or affirmed; and that the answers were taken down by the commissioner, and read over to and signed by the witness.*

XXIX.—Evidence, (Deposition.)

The commissioner shall inclose the commission, depositions, and exhibits, if any, in a packet under his seal, and direct the same to the clerk at Washington, and deposit the packet in the post office, or in an express office, or he may transmit the same by a messenger, whose name shall be by him indorsed upon the packet.

XXX.—Evidence, (Commissioners' Fees.)

The commissioner shall not be obliged to certify and forward the depositions taken for either party until his fees for the taking of the same, and the postage, shall have been paid or tendered

* *Catharine Martin* v. *The United States.* (C. Cls. R., vol. III, p. 384.)

Per curiam: "A commissioner should so connect the sheets of a deposition that they could not be tampered with, and should return them sealed together, so that the unbroken seal would be conclusive proof in their favor. He should sign each sheet, and make the witness sign each sheet, and generally he should spare no pains to return to the court the exact evidence he has taken."

to him by the party at whose instance the commission issued, which fees shall be such as are now, or may hereafter be, prescribed by Congress for the performance of similar duties by commissioners; and the fees of witnesses shall also be such as are now, or may hereafter be, prescribed by Congress, and shall be paid by the party at whose instance the witnesses appear.

XXXI.—EVIDENCE, (DEPOSITIONS.)

Depositions shall be taken by oral examination, or they may, with consent of the parties or under an order of the court, or by order of a judge in vacation, be taken by written interrogatories.

XXXII.—EVIDENCE, (INTERROGATORIES.)

Where it is proposed to take depositions upon written interrogatories, they shall be filed at least fifteen days before the issuing of the rule, and notice given of the same, to enable the opposite party to file cross-interrogatories.

XXXIII.—EVIDENCE, (ORAL EXAMINATION.)

Where a deposition is taken by oral examination, the questions propounded to the witness shall not be written down in the deposition, but the testimony shall be taken in the form of narrative, and, as nearly as can be, in the words of the witness. But where a question is specially objected to as illegal in form or substance, it shall be written down, and the objection noted by the commissioner. And any question asked upon cross-examination, or re-examination, and the answer thereto, shall be written down, if requested by the party interrogating the witness.

XXXIV.—EVIDENCE, (INTERROGATORIES.)

Where a deposition is taken upon written interrogatories filed, neither the solicitor for the United States nor the claimant, his agent, attorney, or any other person, shall be present at the examination of such witness, which fact shall be certified by the commissioner taking the deposition. The commissioner shall, in such cases, propound the interrogatories, and cross-interrogatories, if any, to the witness in their order, and reduce his answer to writing as nearly as practicable in the precise words of the witness.

XXXV.—Evidence, (Objections.)

All objections to the notice, or the form and manner of taking or returning the testimony, shall be made in writing, and filed within thirty days after notice of the filing of any deposition, or they will be considered as waived; and no other objections to the deposition will be considered on the hearing of the cause than such as would be available in a court of common law if the witness were produced for examination in court.

XXXVI.—Evidence, (Order.)

When a petition is filed the clerk shall enter, as of course, an order for taking testimony.

XXXVII.—Briefs, Filing.

The brief of the claimant shall be filed, or a copy delivered to the solicitor, at least thirty days before the hearing of the cause.

XXXVIII.—Briefs, (Requisites.)

The brief shall contain: 1st. The style of the suit, embracing the names of all the parties, upon what founded, and how the cause was brought into court—whether by original petition, or was referred by one of the houses of Congress. 2d. A succinct history of the case, embracing all the leading facts upon which the claim is founded. 3d. An epitome or condensed statement of the evidence adduced by the claimant, with a reference to the pages of the record upon which it is printed. 4th. The argument on the facts. 5th. The argument on matters of law.

Where authorities are referred to in the brief, the principle in support of which they are cited shall be stated, or the syllabus or a short extract shall be quoted.

The brief of the Attorney General will conform, as nearly as the circumstances of the case will admit, to the form prescribed for the brief of the claimant, and shall, in the statement or history of the case, specify wherein his view of the facts differs from that contained in plaintiff's brief. The Attorney General's brief shall be filed within twenty days after receiving that of the claimant, unless the time be extended by the court upon cause shown.

On the argument of a motion or demurrer the briefs will be confined to the points of laws arising in the case, a synopsis of the argument, and a citation of the authorities.

XXXIX.—Items waived.

All items of claim not specified in the brief will be considered as waived.

XL.—Printing.

The testimony and briefs shall be printed, and furnished to the judges at least one day before the hearing of the case. In all cases where the amount claimed exceeds three thousand dollars, each party shall be at the expense of his own printing. In all cases under that amount the printing shall be done, as heretofore, under the direction of the clerk. The printed papers required by these rules shall be in small pica type, and in pages known to printers as royal octavo, and the style and number of the case shall be prefixed to all printed papers and to records of evidence. A proper index of the contents and page shall also be prefixed.

XLI.—Notices, Time of.

When notice is to be given by the Attorney General to a claimant or his attorney residing in a Territory, or in a State on the Pacific, of anything done or to be done in any other State, or in the District of Columbia, double time shall be allowed; and also when notice is to be given to the Attorney General by any claimant or his attorney of anything done or to be done in a Territory, or in a State on the Pacific.

XLII.—Notices, (Clerk.)

Whenever a notice is required to be given by these rules by any other person than by the parties, it shall be the duty of the clerk to send such notice by mail as soon as practicable after the paper requiring such notice shall have been filed in his office.

XLIII.—Notices, Proof of.

The clerk's entry on the docket of notice sent shall be *prima facie* evidence of the service of the notice.

XLIV.—Time.

In the computation of time mentioned in these rules the day of the service of any notice shall be excluded, and the day on which the party is required to appear, or on which an act is required to be done, shall be included.

XLV.—Non Pros. and Discontinuance.

If the claimant neglect for six months after issue joined to proceed thereon, the defendants may give notice of a motion to dismiss the petition, returnable in not less than sixty days, on the first Monday of any month during the term.

In vacation, a claimant, with the approval of a judge of the court, may discontinue a suit pending by a writing filed of record, signed by himself or his attorney of record; and thereupon he shall be entitled to withdraw any papers filed therein, by filing a descriptive list thereof with the clerk. But this rule shall not apply to any case in which fraud is charged, or a set-off pleaded by the United States.

XLVI.—Motions.

All motions submitted to the court shall be in writing, with the style and number of the case to which the motion relates, and signed by the counsel submitting the same; and in no case shall the clerk be required to enter the motion unless this rule be complied with.

A judge will attend at the court room, at 10½ o'clock a. m., of every court day, except Monday, to hear motions. All motions must be heard in the first instance before a single judge, except that in cases of importance or doubt he may direct the hearing to be before the court sitting in banc, and then they will go upon the law docket.

Applications for rules, orders relative to evidence, calls upon the executive departments, motions relating to the trial list or day docket, must be thus submitted to the single judge in the first instance. After the court sitting in banc take up the day docket, the time of the court will be given exclusively to the trial of cases. A case not then ready will go off for the day, and a motion for postponement must be heard by a single judge on the following morning; or the case will go upon the law docket and the motion be heard on the following Monday, as the court may direct.

XLVII.—Evidence, (Witness to be produced before Court.)

The court will reserve the right to remand any case to the docket and order a witness or a claimant to be produced before the court, or one of the judges thereof, and to be re-examined. But the claimant may be produced in the first instance before

the court or one of the judges at chambers, in vacation, and his testimony be thus taken, instead of before a commissioner, and such an examination will be a sufficient compliance with this rule.

XLVIII.—EVIDENCE, (FOREIGN DEPOSITIONS.)

Where it is proposed to take depositions in any foreign country they must be taken upon written interrogatories in the manner provided by rule XXXII of the court; and if the moving party be the claimant at the time of filing his interrogatories, he must also file a full and detailed statement of the testimony expected to be given by the witnesses respectively; and thereupon a special commission will be issued by the court, (or by the Chief Justice or one of the judges during vacation,) to the consul or vice-consul of the United States at the place designated by the moving party. The taking of such depositions and manner of proceeding by the commission and parties shall be subject to rules XVI, XXVIII, XXIX, XXX, XXXIV, and XXXV of this court.

XLIX.—APPEALS.

All applications for and appeal to the Supreme Court of the United States from any judgment or decree of this court which shall hereafter be rendered or made shall be in writing, and be signed by the claimant or his attorney of record, if the appeal be on his behalf; or, if taken by the United States, shall be signed by the Attorney General or his Assistant.

L.—APPEAL IN VACATION.

Whenever such application for an appeal is made in vacation, the same shall be filed with the clerk of this court, and the date of filing the same shall be by him indorsed upon and noted upon the record; and such filing shall be deemed the date of the application for an appeal.

Regulations prescribed by the Supreme Court of the United States, at December term, 1865, under which appeals may be taken from the Court of Claims to said Supreme Court.

RULE I.

In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall

be heard in the Supreme Court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

2. A finding of the facts in the case by the said Court of Claims, and the conclusions of law on said facts on which the court founds its judgment or decree. The finding of the facts and the conclusion of law to be stated separately, and certified to this court as part of the record.

The facts so found are to be the ultimate facts or propositions which the evidence shall establish in the nature of a special verdict, and not the evidence on which these ultimate facts are founded. (See *Burr* vs. *Des Moines Co.*, 1 Wallace, 99.)

RULE II.

In all cases in which judgments or decrees have heretofore been rendered, when either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1, (except the statement of facts and law therein mentioned,) shall constitute the record on which those cases shall be heard in the Supreme Court.

RULE III.

In all cases an order of allowance of appeal by the Court of Claims, or the Chief Justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

ACTS OF CONGRESS

ESTABLISHING

THE COURT OF CLAIMS

AND

IN AMENDMENT THEREOF.

Chap. CXXII, p. 612, vol. X, Statutes at Large.

AN ACT to establish a court for the investigation of claims against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court shall be established, to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behavior; and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress. It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had; specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. Each of the said judges shall receive a compensation of four thousand dollars per annum, payable quarterly, from the treasury of the United States, and shall take an oath to support the Constitution of the United States, and discharge faithfully the duties of his office.

Court of Claims established.

Jurisdiction.

Statement of claims to be made.

Compensation and oath of judges.

SEC. 2. *And be it further enacted*, That a solicitor for the United States, to represent the government before said court, shall be appointed by the President, by and with the advice and consent of the Senate. It shall be the duty of said solicitor to prepare all cases on the part of the government for

United States solicitor in said court to be appointed.

His duties.

hearing before said court, and to argue the same when prepared; to cause testimony to be taken when necessary to secure the interest of the United States; to prepare forms, file interrogatories, and superintend the taking of testimony, in the manner prescribed by said court; and generally to render such service as may be required of him from time to time in the discharge of the duties of his office.

His oath and pay.

Said solicitor shall be sworn to faithful discharge of the duties of his office, in the manner prescribed for the qualifications of the judges in the first section of this act; and he shall receive a compensation of three thousand five hundred dollars per annum for his services, to be paid quarterly from the treasury of the United States.

Rules and regulations.

SEC. 3. *And be it further enacted*, That the said court shall have authority to establish rules and regulations for its government; to appoint commissioners to take testimony to be used in the investigation of claims that may come before it; to prescribe the fees they shall receive for their services; and to issue commissions for the taking of such testimony, whether the same shall be taken at the instance of the claimant or of the United States; and also to issue subpœnas to require the attendance of witnesses in order to be examined before such commissioners; which subpœnas shall have the same force as if issued from a district court of the United States, and compliance therewith shall be compelled under such rules and orders as the court hereby created shall establish. When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when taken at the instance of the government, such fees, together with all postage incurred by the solicitor aforesaid in his official capacity, shall be paid out of the contingent fund provided for said court. In all cases, when it can be conveniently done, the testimony shall be taken in the county where the deponent resides; and the commissioner taking the same is hereby authorized and required to administer an oath or affirmation to the witnesses brought before him for examination.

Commissioners to take testimony.

Subpœnas.

Depositions.

Court may refuse to issue commissions in certain cases.

SEC. 4. *And be it further enacted*, That in all cases where it shall appear to the courts that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony in the case until the same shall have been reported by them to Congress, as is hereinafter provided:

Provided, however, That if Congress shall, in such case, fail to confirm the opinion of said board, they shall proceed to take the testimony in such case.

Cross-examination.

SEC. 5. *And be it further enacted*, That in taking testimony to be used in support of any claim before said court, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded to the claimant in cases where testimony is taken on behalf of the United States under like regulations.

Penalty for false swearing.

SEC. 6. *And be it further enacted*, That if any person shall knowingly and willfully swear falsely before said court, or before any person or persons commissioned by them, or authorized by this act to take testimony in a case pending before said court at the time of taking said oath, or in a case thereafter to be submitted to said court, such person shall be deemed guilty of perjury, and on conviction thereof shall be subjected to the same pains, penalties, and disabilities which now are, or shall be hereafter, by law prescribed for willful and corrupt perjury.

Record to be kept and report to be made.

SEC. 7. *And be it further enacted*, That said court shall keep a record of their proceedings, and shall, at the commencement of each session of Congress, and at the commencement of each month during the session of Congress, report to Congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded. Any judge who may dissent from the opinion of the majority shall append his reasons for such dissent to the report, and such reports, together with the briefs of the solicitor and of the claimant, which shall accompany the report, upon being made to either house of Congress, shall be printed in the same manner as other public documents. And said court shall prepare a bill or bills in those cases which shall have received the favorable decision thereof, in such form as, if enacted, will carry the same into effect. And two or more cases may be embraced in the same bill where the separate amount proposed to be allowed in each case shall be less than one thousand dollars. And the said court shall transmit with said reports the testimony in each case, whether the same shall receive the favorable or adverse action of said court.

Dissenting opinions.

Reports to be printed.

Court to prepare bills.

Claims may be consolidated.

Testimony to be reported.

Reports and bills to be continued from one session to another, and from one Congress to another.

SEC. 8. *And be it further enacted*, That said reports and the bills reported as aforesaid shall, if not finally acted upon during the session of Congress to which the said reports are made, be continued

from session to session, and from Congress to Congress, until the same shall be finally acted upon; and the consideration of said reports and bills shall, at the subsequent session of Congress, be resumed, and the said reports and bills be proceeded with in the same manner as though finally acted upon at the session when presented.

Adverse reports.

SEC. 9. *And be it further enacted*, That the claims reported upon adversely shall be placed upon the calendar when reported, and if the decision of said court shall be confirmed by Congress, said decision shall be conclusive; and the said court shall not at any subsequent period consider said claims, unless such reasons shall be presented to said court as, by the rules of common law or chancery, in suits between individuals, would furnish sufficient ground for granting a new trial.

Rooms to be assigned to said court.

SEC. 10. *And be it further enacted*, That it shall be the duty of the Speaker of the House of Representatives, within a reasonable time after the passage of this act, to appropriate such rooms in the Capitol at Washington, for the use of said court, as may be necessary for their accommodation, unless it shall appear to the Speaker that such rooms cannot be appropriated without interfering with the business of Congress; and in that event the said court shall procure, at the city of Washington, such rooms as may be necessary for the convenient transaction of their business.

Court may call on departments for information.

SEC. 11. *And be it further enacted*, That said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and have the use of all recorded and printed reports made by the committees of each house, when deemed to be necessary in the prosecution of the duties assigned by this act. Said court shall appoint a chief clerk, whose salary shall be two thousand dollars per annum, and an assistant clerk, if deemed necessary, whose salary shall be fifteen hundred dollars per annum, and a messenger, whose salary shall be eight hundred dollars per annum, to be paid quarterly at the treasury. The said clerks shall be under the direction of said court in the performance of their duties, and for misconduct or incapacity may be removed from office by it; but when so removed said board shall make report thereof, with the cause of such removal, to Congress, if in session, or at the next session of Congress. Said clerk and assistant clerk shall take an oath for the faithful discharge of their duties: *Provided*, That the head of no department shall

Chief clerk and assistant clerk.

Their salaries.

Messenger's salary.

Chief clerk and assistant clerk to take an oath.

answer any call for information or papers, if, in his opinion, it would be injurious to the public interest.

Approved February 24, 1855.

Chap. LXXXI, p. 30, vol. XI, Stat. at Large.

AN ACT to amend an act entitled "An act to establish a court for the investigation of claims against the United States," approved February twenty-fourth, eighteen hundred and fifty-five.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any two of the judges of the Court of Claims, authorized by the act to which this is an amendment, approved the twenty-fourth day of February, eighteen hundred and fifty-five, shall constitute a quorum, and may hold a court for the transaction of business, and the court may appoint commissioners to take testimony in the manner prescribed in said act.

Any two of the judges of the Court of Claims to be a quorum.

SEC. 2. *And be it further enacted*, That an assistant solicitor shall be appointed by the President, by and with the advice and consent of the Senate, whose duty it shall be to aid the solicitor in the performance of the duties mentioned in the said act, and shall take an oath to support the Constitution of the United States, and discharge faithfully the duties of said office; and he shall receive a salary of three thousand five hundred dollars per annum, and shall hold his office for a period of four years, unless sooner removed by the President. And the solicitor of the United States, mentioned in the act to which this is an amendment, shall have power, and he is hereby authorized, to employ a deputy, who shall receive a salary of two thousand five hundred dollars per annum, and whose duty it shall be to aid the said solicitor in the performance of the duties mentioned in said act in such way as the said solicitor shall direct.

Assistant solicitor.

Oath.

Salary.

Solicitor may appoint, &c.

Deputy.

SEC. 3. *And be it further enacted*, That the clerk of said court shall be, and he is hereby, authorized to disburse, under direction of the said court, the contingent fund which may hereafter be appropriated, from time to time, for the use of the said court: *Provided*, That he shall first give bond in such an amount, and in such form, and with such security as shall be approved by the Secretary of the Treasury: *And provided further*, That his accounts shall be settled by the proper accounting

Clerk to disburse contingent fund.

Bond.

Settlement of his accounts.

officers of the treasury in the same way that the accounts of other disbursing agents of the government are now settled. And from and after the first day of April, one thousand eight hundred and fifty-six, the salary of the said clerk shall be three thousand dollars per annum, and the salary of the assistant clerk two thousand dollars per annum.

Salary of clerk and assistant clerk,

Approved August 6, 1856.

Chap. XCII, p. 765, vol. XII, Stat. at Large.

AN ACT to amend "An act to establish a court for the investigation of claims against the United States," approved February twenty-fourth, eighteen hundred and fifty-five.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President, by and with the advice and consent of the Senate, two additional judges for the said court, to hold their offices during good behavior, who shall be qualified in the same manner, discharge the same duties, and receive the same compensation, as now provided in reference to the judges of said court; and that from the whole number of said judges the President shall in like manner appoint a chief justice for said court.

Two additional judges for the Court of Claims.

SEC. 2. *And be it further enacted*, That all petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, shall, unless otherwise ordered by resolution of the house in which the same are presented or introduced, be transmitted by the Secretary of the Senate to the Clerk of the House of Representatives, with all the accompanying documents, to the court aforesaid.

All petitions and bills for private claims to be sent to the court.

SEC. 3. *And be it further enacted*, That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the government and claimant; and if upon the whole case it finds that the claimant is in-

Court to consider set-offs, &c., for the government.

If the court finds that the claimant owes the government, to render judgment therefor.

debted to the government, it shall *under* [render] judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit courts of the United States, shall be entered upon the records of the same, and shall, *ipso facto*, become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein.

Transcript of judgment to be entered in district, &c., court, and be enforced like other judgments.

SEC. 4. *And be it further enacted*, That the said Court of Claims shall hold one annual session, commencing on the first Monday in October in each year, and continuing so long as may be necessary for prompt disposition of the business of the court. The said court may prescribe rules and regulations for practice therein, and it may punish for contempt, in the manner prescribed by common law. It may appoint commissioners, and may generally exercise such powers as are necessary to carry out the powers herein granted to it. The judges, solicitors, and clerks of said court shall be admitted to the use of the congressional library, and also the law library, until a law library be provided for them. The said court may appoint a bailiff, who shall hold his office during four years, unless sooner removed by said court for cause, and who shall receive a salary of one thousand dollars, payable quarterly. The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same. Said court shall have a seal, with such device as it may order. Members of either house of Congress shall not practice in said Court of Claims.

Annual session to commence 1st Monday in October.

Rules.

Appoint commissioners.

Use of the congressional and law libraries.

Bailiff, salary.

Judges and clerks to administer oaths, &c.

Seal.

Members of Congress not to practice in Court of Claims.

SEC. 5. *And be it further enacted*, That either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said Supreme Court may direct: *Provided*, That such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided further*, That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the Court of Claims, the Supreme Court

Appeals to Supreme Court of United States.

When to be taken.

When appeal may be had without reference to amount in controversy.

shall entertain an appeal on behalf of the United States without regard to the amount in controversy.

Solicitor and assistants, how appointed.

SEC. 6. *And be it further enacted*, That the solicitor, assistant solicitor, and deputy solicitor of said court shall hereafter be appointed by the President, by and with the advice and consent of the Senate;

Duty.

and it shall be their duty faithfully and diligently to defend the United States in all matters and cases before said Court of Claims, and in all cases taken by appeal therefrom to the Supreme Court;

No fees but salary.

and no other fee or compensation than the salary of said solicitor, and assistant and deputy solicitors, shall hereafter, in any case, be paid to either of them, and no fee or compensation for services in either the Supreme Court or Court of Claims shall hereafter be allowed or paid in any case by the United States.

Claims sustained, how paid.

SEC. 7. *And be it further enacted*, That in all cases of final judgments by said court, or on appeal by the said Supreme Court where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of said Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. And in cases where the judgment appealed from is in favor of said claimant, or the same is affirmed by the said Supreme Court, interest thereon at rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid:

Interest.

Provided, That no interest shall be allowed on any claim up to the time of the rendition of the judgment by said Court of Claims, unless upon a contract expressly stipulating for the payment of interest; and it shall be the duty of the Secretary of the Treasury, at the commencement of each Congress, to include in his report *or* [a] statement of all sums paid at the treasury on such judgments, together with the names of the parties in whose favor the same were allowed: *And it is further provided*,

Payments to be a full discharge and bar all further claims.

That such payments shall be a full discharge to the United States of all claim or demand touching any of the matters involved in the controversy: *And provided further*, That any final judgment rendered against the claimant on any claim prosecuted

as aforesaid shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

Claimant may be examined on oath. Proceedings.

SEC. 8. *And be it further enacted*, That it shall be lawful for said court, at the instance of the solicitor for the United States, to make an order in any case pending in said court, directing that the claimant or claimants in such case, or any one or more of them, shall appear, upon reasonable notice, before any commissioner of said court, and be examined on oath or affirmation touching any or all matters pertaining to said claim. And the examination of such claimant or claimants shall be reduced to writing by the said commissioner, and be returned to and filed in said court, and may, at the discretion of the solicitor for the United States, be read and used as evidence on the trial of said cause. And if any claimant or claimants, after such order has been made, and due and reasonable notice thereof given to him or them, shall fail to appear or shall refuse to testify or answer fully as to all matters within his knowledge material to the issue, the said court may, in its discretion, order that the said cause shall not be brought forward for trial until the said claimant or claimants shall have fully complied with the order of said court in the premises.

Examination to be reduced to writing.

If claimants neglect or refuse.

Court not to have jurisdiction of certain claims.

SEC. 9. *And be it further enacted*, That the jurisdiction of the said court shall not extend to or include any claim against the government not pending in said court on the first day of December, anno Domini eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

Claims to be filed in court within six years.

SEC. 10. *And be it further enacted*, That every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court or transmitted as aforesaid wthin three years after the passage of this act: *And provided furtner*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the

Proviso.

Persons under disability.

claim, shall not be barred if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

Attempts to practice any fraud upon the United States, how punished.

SEC. 11. *And be it further enacted*, That any person or persons who shall corruptly practice, or attempt to practice, any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or any part of any claim, against the United States, shall *ipso facto* forfeit the same to the government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced, or attempted to be practiced, and thereupon give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same. Appeals may be taken from the Court of Claims to the Supreme Court in all such cases, on all questions of law, in the manner herein provided for appeals in other cases.

Appeals.

Petitions to court to be verified by affidavit.

SEC. 12. *And be it further enacted*, That any petition filed under this act shall be verified by the affidavit of the claimant, his agent or attorney, stating that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true: *Provided, however*, That in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof where the claim has been assigned, has at all times borne true allegiance to the government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, which allegations may be traversed by the government; and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed.

Proviso.

Repeal of inconsistent laws.

SEC. 13. *And be it further enacted*, That all laws and parts [of laws] inconsistent with the provisions of this act are hereby repealed.

Money not be paid out for claims until appropriated upon estimates.

SEC. 14. *And be it further enacted*, That no money shall be paid out of the treasury for any claim passed upon by the Court of Claims till after an

appropriation therefor shall be estimated for by the Secretary of the Treasury.

Approved March 3, 1863.

Chap. CXX, p. 820, vol. XII, Stat. at Large.

AN ACT to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the Secretary of the Treasury, from and after the passage of this act, as he shall from time to time see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property in any State or Territory, or any portion of any State or Territory, of the United States, designated as in insurrection against the lawful government of the United States by the proclamation of the President of July 1, 1862: *Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other watercraft, and their furniture, forage, military supplies, or munitions of war.

Special agents to receive and collect abandoned or captured property in certain States.

Proviso.

SEC. 2. *And be it further enacted*, That any part of the goods or property received or collected by such agent or agents may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale within the loyal States, as the public interests may require; and all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the treasury of the United States.

Such property may be appropriated to public use, or sold at public auction in loyal States.

SEC. 3. *And be it further enacted*, That the Secretary of the Treasury may require the special agents appointed under this act to give a bond, with such securities and in such amount as he shall deem necessary, and to require the increase of said amounts and the strengthening of said security as circumstances may demand; and he shall also cause a book or books of accounts to be kept, showing from whom such property was received, the cost of transportation, and proceeds of the sale thereof. And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the

Bond of special agents.

Books to be kept.

Owners of such property may sue for proceeds in Court of Claims.

rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.

Upon what proof may recover.

Property coming into loyal States from States in insurrection, except through special agents, to be confiscated.

SEC. 4. *And be it further enacted*, That all property coming into any of the United States not declared in insurrection as aforesaid from within any of the States declared in insurrection, through or by any other person than an agent duly appointed under the provisions of this act, or under a lawful clearance by the proper officer of the Treasury Department, shall be confiscated to the use of the government of the United States. And the proceedings for the condemnation and sale of any such property shall be instituted and conducted under the direction of the Secretary of the Treasury, in the mode prescribed by the eighty-ninth and ninetieth sections of the act of March 2, 1799, entitled "An act to regulate the collection of duties on imports and tonnage." And any agent or agents, person or persons, by or through whom such property shall come within the lines of the United States unlawfully as aforesaid, shall be judged guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned for any time not exceeding one year, or both, at the discretion of the court. And the fines, penalties, and forfeitures accruing under this act may be mitigated or remitted in the mode prescribed by the act of March 3, 1797, or in such manner, in special cases, as the Secretary of the Treasury may prescribe.

Proceedings for condemnation and sale.

1799, ch. 22, §§ 89, 90, vol. I, p. 695.

Persons through whom property comes unlawfully to be punished.

Remission of penalties.

1797, ch. 13, vol. 1, p. 506.

Pay of special agents at ports opened in States in insurrection.

SEC. 5. *And be it further enacted*, That the fifth section of the "Act to further provide for the collection of the revenue upon the northern, northeastern, and northwestern frontiers, and for other purposes," approved July 14, 1862, shall be so construed as to allow the temporary officers which have been or may be appointed at ports which have been or may be opened or established in States declared to be in insurrection by the proclamation of the President on the 1st of July, 1862, the same compensation which by law is allowed to government officers of the same position, or the ordinary compensation of special agents, as the Secretary of the Treasury may determine.

1862, ch. 169, § 5, vol. XII, p. 572.

Officers and soldiers receiving any such property, or cotton, &c., to turn the same over to special agents.

SEC. 6. *And be it further enacted*, That it shall be the duty of every officer or private of the regular or volunteer forces of the United States, or any officer, sailor, or marine in the naval service of the United States upon the inland waters of the United States, who may take or receive any such abandoned property, or cotton, sugar, rice, or tobacco, from persons in such insurrectionary districts, or have it under his control, to turn the same over to an agent appointed as aforesaid, who shall give a receipt therefor; and in case he shall refuse or neglect so to do, he shall be tried by a court-martial, and shall be dismissed from the service, or, if an officer, reduced to the ranks, or suffer such other punishment as said court shall order, with the approval of the President of the United States.

Penalty for not so doing.

This not to apply to lawful maritime prizes.

SEC. 7. *And be it further enacted*, That none of the provisions of this act shall apply to any lawful maritime prize by the naval forces of the United States.

Approved March 12, 1863.

Chap. CCXL, p. 381, vol. XIII, Stat. at Large.

AN ACT to restrict the jurisdiction of the Court of Claims, and to provide for the payment of certain demands for quartermasters' stores and subsistence supplies furnished to the army of the United States.

Jurisdiction of Court of Claims not to extend to certain claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof.

Claims of certain loyal citizens for quartermasters' stores, how to be settled.

SEC. 2. *And be it further enacted*, That all claims of loyal citizens in States not in rebellion for quartermasters' stores actually furnished to the army of the United States, and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Quartermaster General of the United States, accompanied with such proofs as each claimant can present of the facts in his case; and it shall be the duty of the Quartermaster General to cause such claim to be examined, and, if convinced that it is just, and of the loyalty of the claimant, and that the stores have been actually

received or taken for the use of and used by said army, then to report each case to the Third Auditor of the Treasury, with a recommendation for settlement.

Claims of certain loyal citizens for subsistence furnished to the army, how to be settled.

SEC. 3. *And be it further enacted*, That all claims of loyal citizens in States not in rebellion for subsistence actually furnished to said army, and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Commissary General of Subsistence, accompanied with such proofs as each claimant may have to offer; and it shall be the duty of the Commissary General of Subsistence to cause each claim to be examined, and, if convinced that it is just, and of the loyalty of the claimant, and that the stores have been actually received or taken for the use of and used by said army, then to report each case for payment to the Third Auditor of the Treasury, with a recommendation for settlement.

Approved July 4, 1864.

Chap. XIX, p. 9, vol. XIV, Stat. at Large.

AN ACT in relation to the Court of Claims.

Repealing sec. 14 of act of 1863.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fourteenth section of an act approved the third day of March, anno Domini eighteen hundred and sixty-three, entitled "An act to amend an act to establish a court for the investigation of claims against the United States," approved February twenty-fourth, eighteen hundred and fifty-five, be, and the same is hereby, repealed; and from the final judgment, or decree, in all cases heretofore decided by the Court of Claims, of the character mentioned in the fifth section of said act of March third, eighteen hundred and sixty-three, an appeal shall be allowed to the Supreme Court of the United States at any time within ninety days after the passage of this act, except in such cases where the amounts found due by said court have been paid at the treasury.*

Appeal to the Supreme Court of U. S. allowed in certain cases.

---

* SUPREME COURT OF THE UNITED STATES.—No. 160.—March 10, 1865.—*David Gordon* and *Sarah Gordon*, administrators of David Fisher, deceased, appellants, vs. *The United States.*

Chief Justice CHASE delivered the opinion of the court:

The court has fully considered the able and instructive arguments of counsel upon the question of jurisdiction, which pre-

Term of Court of Claims changed.

SEC. 2. *And be it further enacted*, That the regular session of the Court of Claims shall hereafter commence on the first Monday of December in each year.

Clerk of the court at the end of each term to supply copies, &c.

SEC. 3. *And be it further enacted*, That, at the end of every term of the Court of Claims, the clerk of said court transmit a copy of the decisions thereof to the heads of departments; to the Solicitor, Comptrollers, and Auditors of the Treasury; to the Commissioners of the General Land Office and of Indian Affairs; to the chiefs of bureaus, and to other officers charged with adjusting claims against the United States.

Approved March 17, 1866.

Chap. LXXV, p. 44, vol. XIV, Stat. at Large.

AN ACT to extend the jurisdiction of the Court of Claims.

Court of Claims to hear and determine the claims of paymasters, &c.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise while in the line of his duty, of government funds, vouchers, records, and papers in his charge, and for which such officer was and is held responsible: *Provided*, That an appeal may be taken to the Supreme Court, as in other cases.

Decree.

SEC. 2. *And be it further enacted*, That whenever said court shall have ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer, it shall make a decree, setting forth the amount thereof, upon which the

---

sents itself at the threshold of this cause, and has found itself constrained to the conclusion that under the Constitution it can exercise no appellate jurisdiction over the decisions of the Court of Claims.

We think that the authority given to the head of an executive department, by necessary implication, in the 14th section of the amended Court of Claims act, to revise all the decisions of this court requiring payment of money, denies to it the judicial power from the exercise of which appeals can be taken to this court.

The reasons which necessitate this conclusion may be more fully announced hereafter. At present we restrict ourselves to this general statement, and to the direction that the case be dismissed for want of jurisdiction.

Messrs. Justices MILLER and FIELD dissented.

proper accounting officers of the treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts.

Approved May 9, 1866.

Public resolution No. 50, vol. XIV, Stat. at Large, p. 360.

JOINT RESOLUTION to extend to the counties of Berkeley and Jefferson, of West Virginia, the provisions of the act approved July fourth, eighteen hundred and sixty-four, entitled "An act to restrict the jurisdiction of the Court of Claims, and to provide for the payment of certain demands for quartermasters' stores and subsistence supplies furnished to the army of the United States."

Extending the act of July 4, 1864, to the counties of Berkeley and Jefferson, in West Virginia.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the act of Congress of July fourth, eighteen hundred and sixty-four, entitled "An act to restrict the jurisdiction of the Court of Claims, and for other purposes," be, and the same are hereby, construed to extend to the counties of Berkeley and Jefferson, of the State of West Virginia.

Approved June 18, 1866.

Chap. LVII, p. 397, vol. XIV, Stat. at Large.

1864, ch. 240, vol. XIII, p. 381.

AN ACT to declare the sense of an act entitled "An act to restrict the jurisdiction of the Court of Claims, and to provide for the payment of certain demands for quartermasters' stores and subsistence supplies furnished to the army of the United States."

Claims for supplies, &c., taken or used by the Union troops, or for injuries caused by them in a State, &c., declared in insurrection or, &c., not to be entertained by the Court of Claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of chapter two hundred and forty of the acts of the thirty-eighth Congress, first session, approved July fourth, eighteen hundred and sixty-four, shall not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of, or used by, the armies of the United States, nor for the occupation of, or injury to, real estate, nor for the consumption, appropriation, or destruction of, or damage to, personal property, by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the southern rebellion, in a State, or part of a State, declared in insurrection by the proc-

lamation of the President of the United States, dated July first, eighteen hundred and sixty-two, or in a State which by an ordinance of secession attempted to withdraw from the United States government: *Provided*, That nothing herein contained shall repeal or modify the effect of any act or joint resolution extending the provisions of the said act of July fourth, eighteen hundred and sixty-four, to the loyal citizens of the State of Tennessee, or of the State of West Virginia, or any county therein. Vol. XII, p. 1266. Tennessee and West Virginia excepted.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
LA FAYETTE S. FOSTER,
President of the Senate pro tempore.

Indorsed by the President: "Received February 9, 1867."

[NOTE BY THE DEPARTMENT OF STATE.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

Chap. CLXVI, p. 457, vol. XIV, Stat. at Large.

Section second of the general appropriation act, approved March 2, 1867.

SEC. 2. *And be it further enacted*, That the proviso contained in the third section of chapter two hundred and ten of the act of July second, eighteen hundred and sixty-four, shall be construed to embrace all suits to which the United States shall be a party in the Court of Claims—either plaintiff or defendant.

See Stat. at Large, vol. XIII, p. 351.

Proviso contained in the third section of chapter two hundred and two of the act of July 2, 1864, referred to in the above section.

Provided, That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried.

AN ACT to provide for appeals from the Court of Claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an appeal to the Supreme Court of the United States shall be allowed on behalf of the United States from all the final judgments of the said Court of Claims adverse to the United States, whether such judgments shall have been rendered by virtue of the general or any special power or jurisdiction of said court under the limitations now provided by law for other cases of appeal from said court.

Appeals allowed in all final judgments adverse to the United States

SEC. 2. *And be it further enacted*, That said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

New trial may be granted within two years.

Until an order is made staying the payment, the same to be paid as now provided.

SEC. 3. *And be it further enacted*, That whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant or party asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be prima facie evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.

Loyalty to be proved affirmatively.

Voluntary residence under rebel sway prima facie evidence of giving "aid and comfort."

SEC. 4. *And be it further enacted*, That no plaintiff or claimant, or any person from or through whom any such plaintiff or claimant derives his alleged title, claim, or right against the United States, or any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in supporting any such title, claim, or right, and no testimony given by such plaintiff, claimant,

No claimant to be a competent witness.

or person shall be used: *Provided*, That the United States shall, if they see cause, have the right to examine such plaintiff, claimant, or person as a witness under the regulations and with the privileges provided in section eight of the act passed March third, eighteen hundred and sixty-three, entitled "An act to amend an act to establish a court for the investigation of claims against the United States," approved February twenty-fourth, eighteen hundred and fifty-five.

Attorney General to attend to all matters in the Court of Claims.

SEC. 5. *And be it further enacted*, That from and after the first day of July, eighteen hundred and sixty-eight, the Attorney General of the United States for the time being shall, with his assistants, attend to the prosecution and defense of all matters and suits in the Court of Claims on behalf of the United States. There shall be appointed by the President, by and with the advice and consent of the Senate, two assistant Attorneys General, who shall hold their offices for four years respectively, unless sooner lawfully removed, and whose salaries shall be four thousand dollars each, per year, payable quarterly, and who shall be in lieu of the solicitor, assistant solicitor, and deputy solicitor of the Court of Claims, and of the assistant Attorney General now provided for by law; and the existing offices of solicitor, assistant solicitor, and deputy solicitor of the Court of Claims, and of assistant Attorney General, are hereby abolished from and after the first day of July, eighteen hundred and sixty-eight. The Attorney General shall have power to appoint two additional clerks of the fourth class, and one clerk at a salary not exceeding two thousand dollars, in his office.

Copy of petitions in Court of Claims to be transmitted by Attorney General to departments, &c., when having been acted upon and decided by said departments.

SEC. 6. *And be it further enacted*, That it shall also be the duty of the said Attorney General and his assistants, in all cases brought against the United States in said Court of Claims founded upon any contract, agreement, or transaction with any executive department, or any bureau, officer, or agent of such department, or where the matter or thing on which the claim is based shall have been passed upon and decided by any department, bureau, or officer intrusted by law or department regulations with the settlement and adjustment of such claims, demands, or accounts, to transmit to said department, bureau, or officer, as aforesaid, a printed copy of the petition filed by the claimant in such case, with a request that the said department, bureau, or officer to whom the same shall be so transmitted as aforesaid, will furnish to said

Facts and proof before said departments to be returned to Attorney General.

Attorney General all facts, circumstances, and evidence touching said claim as is or may be in the possession or knowledge of the said department, bureau, or officer; and it shall be the duty of the said department, bureau, or officer to whom such petition may be transmitted and such request preferred as aforesaid, without delay, and within a reasonable time, to furnish said Attorney General with a full statement of all the facts, information, and proofs which are or may be within the knowledge or in the possession of said department, bureau, or officer, relating to the claim aforesaid. Such statement shall also contain a reference to or description of all official documents or papers, if any, as may or do furnish proof of facts referred to in said statement, or that may be necessary and proper for the defense of the United States against the said claim, together with the department, office, or place where the same is kept or may be procured. And if the said claim shall have been passed upon and decided by the said department, bureau, or officer, the statement or answer to be transmitted to said Attorney General, as hereinbefore provided, shall succinctly state the reasons and principles upon which such decisions shall have been based. In all cases where such decision shall have been made upon any act of Congress, or upon any section or clause of such act, the same shall be cited specifically. And if any previous interpretation or construction shall have been given to such act, section, or clause, by the said department or bureau transmitting such statement, the same shall be set forth succinctly in said statement, and a copy of the opinion filed, if any, shall be annexed to such statement and transmitted with the same to the Attorney General aforesaid. And where any decision in the case shall have been based upon any regulation of an executive department, or where such regulation shall or may, in the opinion of the department, bureau, or officer transmitting such statement, have any bearing upon the claim in suit, the same shall be distinctly referred to and quoted in extenso in the statement trasmitted to said Attorney General: *Provided, however*, That where there shall be pending in said court more than one case, or a class of cases, the defense to which shall rest upon the same facts, circumstances, and proofs, the said department, bureau, or officer shall only be required to certify and transmit one statement of the same, and such statement shall be held to apply to all such classes of cases as

Construction of act of Congress acted upon by the departments to be transmitted to the Attorney General.

Proviso.

if made out, certified, and transmitted in each case respectively.

Head of a department may transmit to the Court of Claims claims involving disputed facts or controverted questions of law.

SEC. 7. *And be it further enacted*, That it shall and may be lawful for the head of any executive department, whenever any claim is made upon said department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, to cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant. And the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim of the character, amount, or class described or limited in this section to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said Court of Claims, for trial and adjudication: *Provided, however*, That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases to which, by reason of the subject-matter and character, the said Court of Claims might, under existing laws, take jurisdiction on such voluntary action of the claimant. And all the cases mentioned in this section which shall be transmitted by the head of any executive department, or upon the certificate of any Auditor or Comptroller, shall be proceeded in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations; and appeals from the final judgments or decrees of said court therein to the Supreme Court of the United States shall be allowed in the manner now provided by law. The amount of the final judgments or decrees in such cases so transmitted to said court, where rendered in favor of the claimants, shall in all cases be paid out of any specific appropriation applicable to the same, if any such there be; and where no such appropriation exists, the same shall be paid in the same manner as other judgments of said court.

Claims transmitted must be within the jurisdiction of the court as now established.

Appeals allowed.

No suit to be brought to the Court of Claims against an officer if same is pending in any other court.

SEC. 8. *And be it further enacted*, That no person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Clerk of the Court of Claims to report to Congress at commencement of every session.

SEC. 9. *And be it further enacted*, That it shall be the duty of the clerk of the said Court of Claims to transmit to Congress, at the commencement of every December session, a full and complete statement of all the judgments rendered by the said court for the previous year, stating the amounts thereof and the parties in whose favor rendered, together with a brief synopsis of the nature of the claims upon which said judgments have been rendered.

Repeal.

SEC. 10. *And be it further enacted*, That all provisions of any act incompatible herewith be, and the same are hereby, repealed.

Approved June 25, 1868.

AN ACT regulating judicial proceedings in certain cases, for the protection of officers and agents of the government, and for the better defense of the treasury against unlawful claims.

Act July 28, 1866 extended, &c.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of section eight of the act of July twenty-eight, eighteen hundred and sixty-six, entitled "An act to protect the revenue, and for other purposes," and the forms and modes by that section and the twelfth section of the act of March three, eighteen hundred and sixty-three, therein referred to, prescribed for prosecuting suits, withholding executions, and paying judgments against officers of the United States, or other persons engaged in executing the acts relative to captured and abandoned property, shall extend and be applied to all suits and proceedings (except those in behalf of the United States) which have been brought, or may hereafter be brought, against any officer or agent of the government, civil or military,

for acts done during the rebellion while acting by virtue or under color of his office or employment; and every defendant in such suit or proceeding having made full defense thereto, and having notified the Attorney General of the United States to appear and defend the same, shall be entitled to the full benefit and protection provided in said section for officers and agents of the government engaged in the collection of the public revenue; and any defendant being aggrieved by any order or direction, ruling, or judgment of any court made or had in any such proceeding, may except thereto and appeal therefrom to the Supreme Court of the United States, and have the questions arising there heard and determined.

No action in the name of an alien to be maintained in the courts of the Unit'd States.

SEC. 2. *And be it further enacted*, That no action or suit shall be maintained in any court of the United States, or of any State thereof, in the name or in the behalf or interest of any alien, against the United States, or any person, for or on account of any act done or omitted to be done by such person as an officer or agent of the United States, in the administration of the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," approved March twelve, eighteen hundred and sixty-three, or of the act of Congress entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection," approved July two, eighteen hundred and sixty-four, or in virtue or under color of the acts of Congress aforesaid, or any other acts of Congress relative to the said insurrectionary States, or to persons or property therein; and to any action or suit which may have been heretofore, or shall hereafter be, instituted by any alien against the United States, or any such person as aforesaid, on account of any act done or omitted to be done as aforesaid, the defendant may and shall plead or allege in bar thereof, that such act was done, or omitted to be done, in the administration of one of the acts of Congress aforesaid, or in virtue or under color thereof; and such plea or allegation, if the fact be sustained by the proof, shall be, and shall be deemed and adjudged in law to be, a complete and conclusive bar to any such suit or action: *Provided*, That this section shall not be construed so as to deprive aliens who are citizens or subjects of any

Not to deprive aliens to prosecute claims in the

Court of Claims when the same right is awarded to citizens of the United States by their governments.

government which accords to citizens of the United States the right to prosecute claims against such government in its courts, of the privilege of prosecuting claims against the United States in the Court of Claims, as now provided by law.

Meaning of the "Abandoned or captured property act" declared.

SEC. 3. *And be it further enacted*, That it is hereby declared to have been the true intent and meaning of the act approved March twelve, eighteen hundred and sixty-three, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," that the remedy given in cases of seizure made under said act, by preferring claim in the Court of Claims, should be exclusive, precluding the owner of any property taken by the agents of the Treasury Department as abandoned or captured property in virtue or under color of said act from suit at common law, or any other mode of redress whatever, before any court or tribunal other than said Court of Claims; and in all cases in which suits of trespass, replevin, detinue, or any other form of action may have been brought and are now pending, or shall hereafter be brought against any person for or on account of private property taken by such person as an officer or agent of the United States, in virtue or under color of the act aforesaid, or the act approved July second, eighteen hundred and sixty-four, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection," the defendant may and shall plead or allege in bar thereof that such act was done or omitted to be done by him as an officer or agent of the United States in the administration of one of the acts of Congress aforesaid, or in virtue or under color thereof; and such plea or allegation, if the fact be sustained by the proof, shall be, and shall be deemed and adjudged in law to be, a complete and conclusive bar to any such suit or action:

Proviso as to payment of judgments.

Provided, however, That no judgment, recovered in accordance with this act, shall be paid by the United States, unless the amount received by the defendant as the proceeds of the transaction which was the foundation of the suit shall have been paid into the treasury, except upon an appropriation duly made therefor after a full examination of the claim upon its merits.

Approved July 27, 1868.